SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 335

GENERAL ELECTRIC COMPANY AND UNITED STATES OF AMERICA, APPELLANTS,

vs.

THE STATE OF WASHINGTON

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

INDEX

	Original	Print
Record from the Superior Court of the State of Washington in and for the County of Thurston	1	1
Notice of appeal	1	1
Appeal and complaint	2	1
Answer	8	6
Motion of the United States in intervention (omitted in printing)	10	
Petition in intervention	12	8
Order allowing the United States to intervene	13	8
Memorandum opinion, Wright, J.	14	9
Findings of fact and conclusions of law	15	9
Judgment	30	22
Notice of appeal	32	23
Praecipe (omitted in printing)	33	
Bond (omitted in printing)	35	
Stipulation re right to refund, etc.	37	24
Supplemental praecipe (omitted in printing)	38	
Clerk's certificate (omitted in printing)	39	
Proceedings in the Supreme Court of the State of Washington	48	25

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—1834

	Original	Print
Opinion, Grady, J.	48	25
Dissenting opinion, Finley, J.	55	30
Dissenting opinion, Donworth, J.	70	45
Petition for rehearing	72	47
Order denying petition for rehearing	75	49
Judgment	76	50
Petition for withholding remittitur and stay of execution (omitted in printing)	77	
Stipulation re staying execution (omitted in printing)	78	
Order of stay and withholding remittitur	79	51
Petition for appeal	80	51
Order allowing appeal	82	52
Citation (omitted in printing)	84	
Assignment of errors and prayer for reversal	85	53
Statement required by paragraph 2 of rule 12 of the rules of the Supreme Court (omitted in printing)	88	
Bond (omitted in printing)	149	
Stipulation and order re statement of facts (omitted in printing)	152	
Praecipe (omitted in printing)	153	
Clerk's certificate (omitted in printing)	154	
Record from the Superior Court of the State of Washington in and for the County of Thurston	1	55
Statement of facts	1	55
Testimony of Charles Vandenbulck	8	55
Offer in evidence	14	59
Testimony of Gilbert Church	60	93
Charles Vandenbulck (recalled)	75	96
Gilbert Church (recalled)	79	98
David F. Shaw	82	99
Forrest E. Baker	113	122
Introduction of exhibits	128	134
Testimony of T. M. Jenner	147	138
Judge's certificate (omitted in printing)	250	
Plaintiff's Exhibits	251	208
No. 3—(Excerpts from) Contract No. W-31-109 Eng-52, General Electric Company	251	208
No. 9—Agreed statement of facts in Thurston County Cause No. 22640	339	225
No. 10—General Electric Company materials check to National Carbon Co. Inc. dated October 5, 1948	344	231
No. 11—General Electric Company payroll check to Donald F. Dietz dated March 11, 1949	344	231
No. 12—General Electric Company form used in executing a typical purchase: Purchase requisition, Request for Quotation, Record of Purchase, Purchase Order, Alteration to Purchase Order, Receiving Report, Invoice, Acknowledgment of Order (Duplicates omitted in printing)	345	

	Original	Print
Record from the Superior Court of the State of Washington in and for the County of Thurston—Continued		
Statement of facts—Continued		
No. 13—Letter of L. R. Groves to General Electric Company dated May 8, 1946	384	245
No. 14—Letter of General Electric Company to L. R. Groves dated May 28, 1946	385	246
No. 20—(Excerpts from) Tax Commission Administrative Rulings issued July 21, 1942, February 24, 1943, Rule 223, effective May 1, 1945 and Rule 223 effective May 1, 1947	396	248
No. 23—(Excerpts from) Procedure in Rendering Quotations, Letter from T. W. Brown to T. M. Jenner, dated August 23, 1943, Report of Hearing before Washington State Tax Commission dated August 10, 1943	415	256
No. 25—Sample Excise Tax Return	443	264
No. 26—Administrative Ruling, Washington State Tax Commission, effective November 13, 1946	445	265
No. 27—(Excerpts from) Petitions of General Electric Company dated July 1, 1947 and July 20, 1948	447	266
Statement of points to be relied upon and designation of parts of record to be printed (omitted in printing)	454	
Appellee's designation of parts of record to be printed (omitted in printing)	458	
Order noting probable jurisdiction	464	270

[fol. 1]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF THURSTON

GENERAL ELECTRIC COMPANY, a Corporation, Plaintiff,

vs.

THE STATE OF WASHINGTON, Defendant

No. 24,232

NOTICE OF APPEAL—Filed April 11, 1949

To: The State of Washington, Defendant above named.

Notice is hereby given, that the undersigned taxpayer appeals from the Order of the Tax Commission of the State of Washington, dated April 1, 1949, directed to the undersigned, and is filing herewith its Appeal and Complaint with the Clerk of the Superior Court of Thurston County in the above entitled action, a copy of which is herewith served upon you.

General Electric Company, (S.) by Reuben *G.* Carlson, Attorney; Howard Carothers, Attorney.

Acknowledgement of Service (omitted in printing).

[File endorsement omitted.]

[fol. 2] In the Superior Court of the State of Washington

[Title omitted]

APPEAL AND COMPLAINT—Filed April 11, 1949

I

The plaintiff, General Electric Company, a New York corporation, on or about September 1, 1946, in the Counties of Benton, Franklin, Yakima and Grant, all in the state of Washington, entered upon the performance of a pure cost contract with the United States of America, dated May 15, 1946, and effective that date, and known, num-

bered and lettered as Contract No. W-31-109 eng-52. In substance the mentioned Contract provides that the plaintiff's sole compensation for complete performance of the mentioned Contract, and all Supplements thereto, is to be the nominal sum of ONE DOLLAR ($1.00).

II

All license fees required by law to be paid by the plaintiff to the State of Washington have been paid and plaintiff is in all respects qualified to bring this action.

III

In the performance of the above mentioned Contract, the plaintiff, during all of the times mentioned, has been required to and had disbursed large sums of money from a fund provided by the United States of America, in the payment of wages and salaries to those employed in the performance of the mentioned Contract, and for and in the acquisition of the material, supplies and equipment necessary for its performance of the mentioned Contract. From time to time and pursuant to the provisions of the mentioned Contract, the United States of America through its authorized disbursing agents has replenished the above mentioned fund. That all expenditures by the plaintiff [fol. 3] and under the mentioned Contract have been made out of the aforesaid fund, and the plaintiff receives reimbursements in accordance with the mentioned Contract, which reimbursements are credited to said fund.

IV

From the date of the plaintiff's entry upon the performance of the mentioned Contract, and continuously since, the Tax Commission of the State of Washington has held that the amounts received by it from the United States of America in reimbursement for the expenditures made by it in the performance of the Contract above described, are includable in its gross income and taxable as such under the provisions of Title II of the Revenue Act of 1935, as amended, entitled Business and Occupation Tax, being Section 8370-4 to and including Section 8370-15 of Reming-

ton's Revised Statutes of Washington, as amended to date, and has demanded of the plaintiff payment in full of the tax allegedly imposed under the mentioned statutes on account of all of the reimbursements above described.

V

In compliance with demands of the Tax Commission of the State of Washington, and solely in order to avoid penalties, the plaintiff has paid in full at the times and in the amounts and for the periods hereinafter set out the business and occupation taxes determined and held to be due by the Tax Commission of the State of Washington, and demanded by the Tax Commission of the State of Washington as follows:

Date of Payement	Period Covered	Business and Occupation Tax
	1946	
February 5, 1947	September and October	$ 2,931.38
February 5, 1947	November and December	6,034.17
	1947	
March 19, 1947	January and February	12,500.74
May 21, 1947	March and April	10,531.22
July 30, 1947	May and June	11,912.44
September 24, 1947	July and August	13,921.25
December 2, 1947	September and October	16,557.59
February 6, 1948	November & December	29,684.91
	1948	
April 2, 1948	January and February	41,013.75
June 7, 1948	March and April	60,480.53
August 11, 1948	May and June	63,573.53
October 15, 1948	July and August	62,348.52
December 17, 1948	September and October	55,998.14
February 9, 1949	November and December	74,841.29

The aggregate amount so paid by the plaintiff to the Tax [fol. 4] Commission of the State of Washington on account of business and occupation taxes measured by reimbursements made to it by the United States of America is FOUR HUNDRED SIXTY-TWO THOUSAND, THREE HUNDRED TWENTY-NINE and 46/100 DOLLARS ($462.320.46).

VI

That at all times since September 1, 1946, the plaintiff has asserted and maintained before the Tax Commission

of the State of Washington that in its performance of Contract No. W-31-103 eng-52, it is not subject to taxation by the State of Wasbington, and that the amounts received by it from the United States of America in reimbursement for expenditures for labor, services, material, equipment and supplies, while engaged in the performance of Contract No. W-31-109-eng-52, were not subject to taxation by the State of Washington under Title II of the Revenue Act of 1935, as amended, and that such taxation is invalid and void because violative of Section 9(b) of an Act of the Congress of the United States, approved August 1, 1946, commonly known as the "Atomic Energy Act of 1946", and being Public Law 585, 79th Cong., 2nd Session, and is violative of Article VI, Clause 2 of the Constitution of the United States, and has protested to the Tax Commission of the State of Washington and now alleges that Title II of the Revenue Act of 1935, as amended, as applied by the Tax Commission of the State of Washington to this plaintiff, is invalid under the Constitution of the United States of America, and under the Act of Congress hereinabove mentioned.

VII

The plaintiff further alleges as follows:

a. That in the performance of Contract No. W-31-109 eng-52, it was not engaged in business in the State of Washington within the intendment of Title II of the Revenue Act of 1935, as amended.

b. That for the purposes of Title II of the Revenue Act of 1935, as amended, the plaintiff in the performance of Contract No. W-31-109 eng-52, acted as an agent or instrumentality of the United States of America, and was not subject to taxation by the State of Washington under the Constitution of the United States of America.

c. That as applied to the plaintiff in performance of [fol. 5] Contract No. W-31-109 eng-52, Title II of the Revenue Act of 1935, as amended is invalid under the Constitution of the United States of America, and the Act of Congress hereinabove mentioned.

d. That if Title II of the Revenue Act of 1935, as amended

purports to impose the taxes demanded of the Plaintiff, and paid by it as above described, Title II of the Revenue Act of 1935, as amended, is invalid for the reason that it deprives the plaintiff of its rights under Section 1 of Article XIV of the Constitution of the United States of America.

VIII

That in the performance of Contract No. W-31-109-eng-52, the plaintiff at all times pertinent hereto was and is exempt from taxation under Title II of the Revenue Act of 1935, as amended.

IX

That in conformity with the statutes of the State of Washington, this plaintiff in due time filed with the Tax Commission of the State of Washington its petitions for refund of the taxes paid by it and hereinabove set out, and in conformity with the statutes of the State of Washington, and in due time as prescribed in those statutes, the Tax Commission of the State of Washington conducted hearings upon the petitions for refund filed by the plaintiff as aforesaid, and on April 1, 1949, entered its order denying the refund to this plaintiff of the taxes paid by it as above set out, and on April 1, 1949, the Tax Commission of the State of Washington duly notified the plaintiff of its order denying refund as aforesaid.

X

Plaintiff alleges at all times since December 31, 1946, in its performance of Contract No. W-31-109 eng-52, it has been subject to the provisions of the Atomic Energy Act of 1946 above mentioned and Executive Order No. 9816 of the President of the United States, dated December 31, 1946, effective as of midnight eastern standard time as of that date.

Wherefore, plaintiff prays that a hearing be granted upon this Appeal and Complaint, and that upon such hearing an order be entered abating the business and occupation taxes assessed against the plaintiff under Title II of the Revenue Act of 1935, as amended, and paid by it, as set out in this [fol. 6] Appeal and Complaint, and that a judgment and

Order of refund in the amount of Four Hundred Sixty-Two Thousand, Three Hundred Twenty-Nine and 46/100 Dollars ($462,329.46), the amount of the purported business and occupation taxes heretofore paid by the plaintiff as above set out, be entered herein with interest as allowed by law, and that the plaintiff have such other and further relief as may be proper.

General Electric Company, (S.) by F. E. Baker, Assistant Secretary.

(S.) Reuben C. Carlson, Howard Carothers, Attorneys for Plaintiff, 1112 Rust Building, Tacoma 2, Washington.

[File endorsement omitted.]

[fol. 7] *Duly sworn to by Forrest E. Baker. Jurat omitted in printing.*

[fol. 8] IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

[Title omitted]

ANSWER—Filed April 11, 1949

Defendant, in answer to plaintiff's Appeal and Complaint, admits, denies and alleges as follows:

I

Admits that plaintiff has paid to the State of Washington Business and Occupation taxes measured by reimbursements made to it by the United States of America under contract No. W-31-109 eng-52, and that such taxes were paid on certain dates, for certain periods, and in certain amounts, as follows:

Date of Payment	Period Covered	Business and Occupation Tax
	1946	
February 5, 1947	September and October	$ 2,931.38
February 5, 1947	November and December	6,034.17
	1947	
March 19, 1947	January and February	12,500.74
May 21, 1947	March and April	10,531.22
July 30, 1947	May and June	11,235.59
September 24, 1947	July and August	13,921.25
December 2, 1947	September and October	16,557.59
February 6, 1948	November and December	29,684.91
	1948	
April 2, 1948	January and February	41,013.75
June 7, 1948	March and April	60,480.53
August 11, 1948	May and June	63,573.53
October 15, 1948	July and August	62,348.52
December 17, 1948	September and October	55,998.14
February 9, 1949	November and December	74,841.29
		$461,652.61

[fols. 9-11] II

Denies each and every remaining allegation set forth in plaintiff's Appeal and Complaint.

Wherefore, defendant prays that plaintiff's Appeal and Complaint be dismissed, and that defendant be awarded its costs and disbursements herein.

(S.) Smith Troy, Attorney General. (S.) Max Kaminoff, Assistant Attorney General. (S.) Jess N. Rosenberg, Assistant Attorney General, Attorneys for State of Washington.

Duly sworn to by Max Kaminoff. Jurat omitted in printing.

Copy Received April 8, 1948. (S.) Reuben C. Carlson, one of the Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 12] IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

[Title omitted]

PETITION IN INTERVENTION—Filed June 26, 1951

Comes now the United States, and for its Petition in Intervention in this cause, respectfully represents to the Court:

1. That it is a real party in interest;
2. That it adopts and incorporates herein, by reference, each and every allegation set forth in the Plaintiff's Appeal and Complaint heretofore filed;
3. That it joins in the Plaintiff's prayer for the relief sought.

United States of America, by J. Howard McGrath, Attorney General of the United States; Theron L. Caudle, Assistant Attorney General. (S.) by Berryman Green, Special Assistant to the Attorney General.

[File endorsement omitted.]

[fol. 13] IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

[Title omitted]

ORDER ALLOWING THE UNITED STATES TO INTERVENE—Filed June 26, 1951

This cause came on this day to be heard upon the Petition in Intervention, filed on behalf of the United States, and upon consideration thereof, the Court does enter its Order allowing the United States to intervene herein.

Done in open court, this 26th day of June, 1951.

(S.) Charles T. Wright, Judge.

Presented by: Berryman Green (S.)

[File endorsement omitted.]

[fol. 14] IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

[Title omitted]

MEMO. OPINION—Filed September 20, 1951

It has been uniformly held that contractors in positions similar to that of plaintiff are independent contractors and this Court holds specifically that plaintiff is an independent contractor and not an agent of the commission and that except for the Atomic Energy Act, the rule of *Alabama vs. King & Boozer*, 314 U. S. would apply.

The act, however, has brought into this case a problem which presents genuine difficulty. The Court believes that the intent of Congress was to exempt from taxation the contractor such as plaintiff. Any other result would make the legislation meaningless. The commission, its property and its income are exempt from taxation without legislation and it will not be presumed that Congress did a vain, or useless thing. The major activities of the commission are, and Congress well knew would be, carried on through independent contractors.

The plaintiff should prevail.

(S.) Charles T. Wright, Judge.

Dated this 20th day of September, 1951.

[File endorsement omitted.]

[fol. 15] IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

[Title omitted]

Findings of Fact and Conclusions of Law—Filed October 8, 1951

The above entitled cause came on regularly for trial on the 12th day of April, 1949, before the Court sitting without a jury, no jury having been requested, Reuben C. Carlson, Howard Carothers and Berryman Green, appearing for the

plaintiff, and Jess N. Rosenberg, Max Kaminoff, William Klein and C. John Newlands, appearing for the defendant; and evidence both oral and documentary having been introduced and Briefs having been submitted by counsel for both parties, and the Cause submitted for decision, the Court now makes its Findings of Fact, as follows:

Findings of Fact

I

The plaintiff, General Electric Company, a New York Corporation, has paid all fees required by law and is in all respects qualified to do business within the State of Washington. That plaintiff, on or about September 1, 1946, in the Counties of Benton, Franklin, Yakima and Grant, all in the State of Washington, entered upon the performance of a pure cost Contract with the United States of America, dated May 15, 1946, and effective that date, and known, numbered and lettered as Contract No. W-31-109 eng-52, [fol. 16] known in this Cause as Plaintiff's Exhibit No. 3.

II

That on or about August 16, 1944, the Manhattan Engineer District came into being, by special order of the War Department, charged with the responsibility of developing the atomic bomb. This involved a tremendous amount of research, construction of a large construction plant and various installations throughout the country, and the ultimate assembly of the finished product, the bomb.

III

That E. I. duPont deNemours & Company, built, managed and operated for the Manhattan Engineer District, the Hanford Engineer Works, a federally owned project for the production of fissionable materials, now known as Hanford Engineer Works.

IV

That upon the termination of World War II, the duPont Company, as provided in its Contract, requested that it be relieved from the operation of the Hanford Engineer Works

and its Contract. That it became necessary for the Manhattan Engineer District to obtain a new operator qualified to succeed the duPont Company and take on the operation of the project. That the continuation of the work was vital to the national welfare, security, and defense; therefore, acting pursuant to and in accordance with delegations of authority under the Act of Congress of December 18, 1941 (Public Law No. 354, 77th Congress), known as the First War Powers Act of 1941, which provided for the Executive Branch of the Federal Government to enter into certain contractual arrangements for the purpose of expediting and furthering the prosecution of the war, the Manhattan Engineer District, Corps of Engineers, War Department, entered into the hereinabove set forth Contract with the [fol. 17] Plaintiff, General Electric Company, on May 15, 1946. This Contract was subsequently formally adopted by the United States Atomic Energy Commission on January 28, 1947.

V

That in the course of performance required by the Contract, the Plaintiff was required to and did expend large sums of money from funds created by advances and current reimbursements thereto from the United States of America and money collected on behalf of the United States from private persons, firms and corporations, which monies were applied to the performance of the Contract, and Plaintiff has continued to receive such reimbursements throughout the entire period of performance.

The Plaintiff Contractor was not and is never required to utilize its own funds. The tax collected by the State has been measured by the total amount of reimbursements for labor and materials, that is, the cash paid into Plaintiff's account by the United States, the funds received by the Plaintiff from third parties and deposited in the account, and credits received through payroll deductions. From the fund so created the Plaintiff pays the salaries of its employees, the cost of materials procured for the work and any and all other expenses incurred under the Contract.

VI

That from the date of the Plaintiff's entry upon the performance of the Contract, and continuously since, the Tax Commission of the State of Washington has held that the amounts received by Plaintiff (as hereinbefore set forth), are includable in its gross income for the purpose of computing the measure of the tax payable under the provisions of Title II of the Revenue Act of 1935, as amended, entitled Business and Occupation Tax, being Section 8370-4 to and [fol. 18] including Section 8370-15 of Remington's Revised Statutes of Washington, as amended to date, and has demanded of Plaintiff payment in full of the tax so levied.

VII

That plaintiff, in compliance with the demands of the Tax Commission of the State of Washington, and solely in order to avoid penalties, has paid in full and at the times and in the amounts and for the periods hereinafter set out the business and occupation taxes determined and held to be due by the Tax Commission of the State of Washington, as follows:

Date of Payment	Period Covered	Business and Occupation Tax
	1946	
February 5, 1947	September and October	$ 2,931.38
February 5, 1947	November and December	6,034.17
	1947	
March 19, 1947	January and February	12,500.74
May 21, 1947	March and April	10,531.22
July 30, 1947	May and June	11,235.59
September 24, 1947	July and August	13,921.25
December 2, 1947	September and October	16,557.59
February 6, 1948	November and December	29,684.91
	1948	
April 2, 1948	January and February	41,013.75
June 7, 1948	March and April	60,480.53
August 11, 1948	May and June	63,573.53
October 15, 1948	July and August	62,348.52
December 17, 1948	September and October	55,998.14
February 9, 1949	November and December	74,841.29

The aggregate amount so paid by the plaintiff to the Tax Commission of the State of Washington on account of business and occupation taxes measured by reimbursements

made to it by the United States of America, prior to the bringing of the within action, was Four Hundred Sixty-two Thousand, Three Hundred Twenty-nine and 46/100 Dollars ($462,329.46).

It has been stipulated that the following additional amounts of said tax have been paid:

[fol. 19]

Date of Payment	Period Covered	Business and Occupation Tax
	1949	
April 19, 1949	January and February	$ 68,226.78
June 16, 1949	March and April	51,062.07
August 18, 1949	May and June	41,901.98
October 14, 1949	July and August	32,182.50
December 16, 1949	September and October	21,574.92
February 15, 1950	November and December	20,144.01
	1950	
March 23, 1950	January and February	16,330.03
June 2, 1950	March and April	21,801.84
August 11, 1950	May and June	23,100.44
October 13, 1950	July and August	24,148.86
December 18, 1950	September and October	27,294.22
February 19, 1951	November and December	28,837.59
	1951	
April 9, 1951	January and February	34,924.74
May 23, 1951	March and April	29,749.01
July 16, 1951	May and June	44,471.20
Total		$485,750.19

The Court finds that said amounts should be included within a Judgment herein, pursuant to said Stipulation.

[fol. 20]

VIII

That under its Contract the Plaintiff was obligated to:

1. Manage and operate all the fissionable material production facilities of the project.

2. Manage and operate the Village of Richland and the construction camp community at North Richland, providing all necessary municipal facilities and services at Government expense and serving as agent for the Government for all real estate which comprises the communities.

3. Construct or provide for the construction of all plants and facilities needed for manufacturing processes and facilities related thereto and construct or

provide for the construction of residential communities and other facilities necessary for the functioning of the communities.

4. Provide all architect-engineer services in connection with the foregoing.

5 Conduct development and research relative to production of fissionable materials.

IX

That under the terms, covenants and conditions of said Contract the Plaintiff is to be reimbursed for all costs of whatever nature incurred under the Contract, and to receive as its sole payment at the completion of the Contract a fixed fee of One Dollar ($1.00).

X

[fol. 21] That by virtue of the terms of the Atomic Energy Act of 1946, as amended, and the Contract, all property and equipment utilized by the Plaintiff in the production and construction contemplated under the Contract, title to all drawings, designs and specifications created under the Contract and complete control over the product, and all its component parts, while in process and after manufacture, vests in the Atomic Energy Commission, and patents to all processes and designs conceived or developed under the Contract are owned by the Atomic Energy Commission or are assignable to it, if the Atomic Energy Commission desires.

XI

That the Plaintiff prepares preliminary studies, final designs, cost estimates, supervises all construction work, makes appropriate field tests, submits progress reports, and performs all other architectural and engineering services required by the Contract, either subject to the approval or at the direction of the Atomic Energy Commission.

XII

That the Atomic Energy Commission reserves the right to furnish any or all of the materials and equipment in accordance with the Contract.

XIII

That the Plaintiff must obtain the prior approval or ratification of the Atomic Energy Commission for all purchases or contracts over Five Thousand Dollars ($5,000.00), (and in the case of construction over Two Thousand Dollars ($2,000.00)).

XIV

1. That the Plaintiff is required to get approval of the Atomic Energy Commission before purchasing or utilizing materials, supplies, and equipment of its own manufacture, [fol. 22] when the price is Two Hundred Fifty Dollars ($250.00), or over.

2. That the Hanford Operations Office of the Atomic Energy Commission at all times maintains constant supervision of the Plaintiff's actions in the performance of the Contract.

3. That the Plaintiff is subject to the administrative and technical procedures prescribed by the Atomic Energy Commission in the construction, operation and research phases of the Contract.

4. That the Atomic Energy Commission has the right to pay directly to third parties all sums due for labor, material and other charges arising from the Contract.

5. That all construction subcontracts are subject to the approval of the Atomic Energy Commission.

6. That all subcontracts for the operation, research development, and production processes require the prior approval or ratification of the Atomic Energy Commission.

7. That production schedules are prescribed by the Atomic Energy Commission.

8. That all work and services of the Plaintiff under the terms of the Contract are subject in all respects to the approval of the Atomic Energy Commission.

XV

That the area known as the Hanford Works, which is the situs of the Plaintiff's operation and performance of the Contract, was obtained by the Government for the sole purpose of constructing and operating the Government's atomic energy plant. Certain basic requirements make the area geographically desirable. The Government acquired

by purchase or condemnation all of the land, something in excess of 400,000 acres, on which the communities and plants [fol. 23] were built. Although the Government did not take exclusive jurisdiction of the area, all unauthorized persons are excluded from the area, with the exception of the village of Richland and the community of North Richland. All ingress and egress of people is controlled and only permitted to those with official business who have obtained security clearance in accordance with the requirements of Section 10 of the Atomic Energy Act. In addition to the controls on the ground that have been established by Public Proclamations 18 and 28, dated July 14, 1943, and November 12, 1946, respectively, issued by the Commanding Officer, Western Defense Command and by Headquarters, Sixth Army, respectively, the President of the United States on January 17, 1948, by Executive Order No. 9925 established air space reservation over the Hanford Works at Richland, Washington. Thus, complete control by the Government over the area is exercised. Practically all of the buildings on the land comprising the area known as the Hanford Works, including the village of Richland, were either built for, have been purchased by, or belong to the Government.

XVI

That Plaintiff performs all the municipal activities for the area included within the Hanford Works, particularly for the community of Richland. It constructs roads necessary for the prosecution of the work and maintains these roads. Further, the General Electric Company, at the direction of the Government, has provided school facilities, police and fire protection, sewage, lighting, town bus system, dormitories, and a hospital, all of which are Government-owned. The Plaintiff manages and maintains housing facilities in the Hanford Works area and grants licenses and leases to persons, firms and corporations for the operation of businesses and commercial enterprises for the benefit of personnel located on or connected with the project. [fol. 24] The General Electric Company collects the revenue from such license and lease arrangements for and on behalf of the Government. Under its Contract, the General Electric Company provides these services and executes the

necessary contracts for housing, licenses, leases and concessionaire agreements as agent of the Government. The Plaintiff has so acted at all times in its management of the Government properties and receievd reimbursements therefor, which are asserted by the Defendant to be taxable under the Washington State Business and Occupation Tax (Rule 223, Rules Relating to the Revenue Act). The General Electric Company owns none of the real or personal property which it operates and manages in the performance of its Contract.

XVII

That all property, materials, (with the exception of fissionable materials), supplies and equipment are procured by the General Electric Company for use under the Contract, title to which vests in the Government at the same time and place as it vests in the General Electric Company, and the contractor is required to suitably mark all property so acquired in a special manner that clearly indicates that the items are the property of the Government. All procurement and procedures therein are approved by the Government.

XVIII

That the price and other terms and conditions of sale of any materials or equipment manufactured by the General Electric Company and used on the project are subject to the approval of the Government. The vendors of material purchased by the General Electric Company are paid by checks drawn on the revolving fund.

[fol. 25]

XIX

That the Contract also authorizes the General Electric Company to lease, transfer or otherwise dispose of such Government-owned property in its possession to such persons upon the terms and conditions as may be approved or ratified by the contracting officer, and the proceeds of such leases, transfers or dispositions are applied in the reduction of the cost of the work under the Contract.

XX

That the Contract is to be performed entirely at the expense of the Government and the contractor is not to be liable for and the Government shall indemnify and hold the contractor harmless against any delay, failure, loss, expense (including the expense of litigation) or damage (including personal injuries and deaths of persons and damage to property) of any kind and for any cause whatsoever arising out of or connected with the work and whether or not any employee or employees of the contractor is responsible therefor, unless such delay, failure, loss, expense or damage has been established by the Government to have been caused directly by bad faith or wilful misconduct on the part of certain named corporate officers of the contractor within the scope of his or their authority and employment. This provision, which is an extraordinary provision in Government contracts, was approved by the President of the United States as it originally appeared in the contract between the du Pont Company and the Manhattan Engineer District. Further, it is provided that the Government shall assume and carry on the defense of all claims, suits or legal proceedings which might be asserted against the contractor on account of acts or omissions in the performance of the work, and that the Government shall pay directly and discharge completely all final judgments entered against the con-[fol. 26] tractor in such litigation or claims which are settled by agreement approved by the contracting officer.

XXI

That salaries and expenses of the company's employees are paid by the Government. These salaries are subject to the approval of the contracting officer. When, in the opinion of the contracting officer, the Plaintiff's personnel or overhead is excessive for the proper performance of the Contract, reductions are to be made as required by the contracting officer, subject to the right of appeal by the contractor pursuant to the "Disputes" articles of the Contract.

XXII

That the contractor is required to dismiss employees deemed by the Government to be incompetent, careless, in-

subordinate, or whose continued employment is deemed to be inimical to the public interest.

XXIII

That under the Contract, the General Electric Company operates units for the production of fissionable materials at capacity or on such other scale as required by the contracting officer. In order that this can be accomplished, the contractor has to procure and train the necessary personnel and the extent and character of the training is subject to the approval of the contracting officer.

XXIV

That under the Contract the General Electric Company provides the personnel and certain technical experience and the Government provides the facilities, money, and upon consultation with the contractor, formulates the policies and programs to be carried out, subject to the controls under [fol. 27] the program by the Executive and Legislative Branches of the Government as set forth in the Atomic Energy Act. The actual plant operations are carried on by the employees of the Plaintiff under the general supervision of the Government, and subject to and in accordance with policies and instructions from the Government. At all times there is a very close coordination between the General Electric Company and the Government.

XXV

That all practices and procedures, safety regulations and other preventive measures directed at the health hazards inherent in the production of radioactive materials are prescribed or approved by the Government and the standards of exposure followed in the plant areas are approved by the Government.

The fissionable materials used in the operation of the plant are procured and furnished by the Government and their use carefully and systematically controlled and accounted for under the direction and supervision of the Government.

XXVI

That in conformity with the statutes of the State of Washington, this Plaintiff in due time filed with the Tax Commission of the State of Washington, its petitions, in writing, for refund of the taxes paid by it and hereinabove set out, and in conformity with the statutes of the State of Washington, and in due time as prescribed in those statutes, the Tax Commission of the State of Washington conducted hearings upon the petitions for refund filed by the Plaintiff as aforesaid, and on April 1, 1949, entered its order denying the refund to this Plaintiff of the taxes paid by it as above set out, and on April 1, 1949, the Tax Commission of the State of Washington duly notified the Plaintiff of its order [fol. 28] denying refund as aforesaid.

XXVII

That counsel have stipulated that the amounts hereinbefore set forth, paid subsequent to February 9, 1949, should abide by the judgment of the Court herein, and are entitled to be included in the Judgment in this Cause.

From the foregoing Findings of Fact, the Court draws the following

Conclusions of Law

I

Plaintiff is an independent contractor, and not an agent of the Atomic Energy Commission.

II

That plaintiff is not entitled to a refund with respect to taxes paid for business conducted between September 1, 1946, and January 1, 1947, by reason of the fact that it was an independent contractor with the United States Government, and in the absence of any statutory provision enacted by Congress immunizing such contractor, the business and occupational tax applies.

III

Under Sections 189 and 199, Ch. 180, Laws of 1935, as amended, plaintiff is entitled to recover Judgment against

defendant in the amount of all taxes paid for business conducted on and after January 1, 1947, as set forth in the foregoing Findings of Fact, pursuant to the finding of this Court that the taxes were deductible under Section 12F, Ch. 180, Laws of 1935, as amended.

IV

Section 9B of the Atomic Energy Act of 1946 immunizes [fol. 29] Plaintiff as an independent contractor with the Atomic Energy Commission from the payment of business and occupational taxes to the State of Washington, with respect to its reimbursements received in connection with the performance of its contract with the Atomic Energy Commission.

V

That by reason of the foregoing, Plaintiff is entitled to have and recover judgment against the defendant in the sum of Nine Hundred Thirty-Eight Thousand, Four Hundred Thirty-Seven and 25/100 Dollars ($938,437.25), together with interest at the rate of three per cent (3%), until paid, on the sum of Four Hundred Seventeen Thousand, Five Hundred Twenty-Three and 41/100 Dollars ($417,523.41), this being the amount of the aforesaid taxes paid subsequent to May 1, 1949, together with such costs as are allowable by law.

Done in open court, this 8th day of October, 1951.

(S.) Charles T. Wright, Judge.

Approved as to form: (S.) C. John Newlands, Assistant Attorney General, of Attorneys for Defendant.

Presented by: (S.) Reuben C. Carlson, of Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 30] IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

[Title omitted]

JUDGMENT—Filed October 8, 1951

The above entitled cause came on regularly for trial on the 12th day of April, 1949, before the Court sitting without a jury; Reuben C. Carlson, Howard Carothers and Berryman Green, appearing for the plaintiff, and Jess N. Rosenberg, Max Kaminoff, William Klein, Smith Troy, Attorney General, and C. John Newlands, Assistant Attorney General, appearing for the defendant; and evidence both oral and documentary having been introduced, and the cause submitted for decision, and the Court having heretofore made and caused to be filed herein its written Findings of Fact and Conclusions of Law, and being fully advised: now, therefore, in accordance with said Findings of Fact and Conclusions of Law, it is

Ordered, adjudged and decreed that the plaintiff does have and recover of and from the defendant the sum of Nine Hundred Thirty-eight Thousand, Four Hundred Thirty-seven and 25/100 Dollars ($938,437.25) together with interest at the rate of three per cent (3%), until paid, on the sum of Four Hundred Seventeen Thousand, Five Hundred Twenty-three and 41/100 Dollars ($417,523.41). [fol. 31] of said amount, together with such costs as are allowable by law.

Done in open court, this 8th day of October, 1951.

(S.) Charles T. Wright, Judge.

Approved as to form:

C. John Newlands (S.), Assistant Attorney General, of Attorneys for Defendant.

Presented by:

Reuben C. Carlson (S.), of Attorneys for Plaintiff.

[File endorsement omitted.]

[fols. 32-36] IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

[Title omitted]

NOTICE OF APPEAL—Filed October 22, 1951

To: General Electric Company, plaintiff above-named, and to Reuben Carlson and Howard Carrothers, its attorneys:

Notice is hereby given that the above-named defendant, feeling aggreieved by the judgment made and entered on October 8, 1951, in the above-entitled cause in the Superior Court of the State of Washington in and for Thurston County, hereby appeals to the Supreme Court of Washington from the aforementioned judgment.

Dated this 19th day of October, 1951.

(S.) Smith Troy, Attorney General, (S.) C. John Newlands, Assistant Attorney General. Attorneys for Defendant.

Copy Received:

Reuben C. Carlson (S.), Howard Carothers (S.), sec., Attorneys for Plaintiff.

[File endorsement omitted.]

[fols. 37-38] IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

No. 22640

STIPULATION

E. I. DU PONT DE NEMOURS and COMPANY, a Corporation, Plaintiff,

vs.

THE STATE OF WASHINGTON, Defendant

No. 24232

STIPULATION RE RIGHT TO REFUND—Filed April 24, 1951

GENERAL ELECTRIC COMPANY, a Corporation, Plaintiff,

vs.

THE STATE OF WASHINGTON, Defendant

The parties to the above entitled actions, by and through their attorneys of record, hereby stipulate and agree as follows:

Nothing contained in section 6, chapter 9, Laws of 1951, Extraordinary Session, shall be construed to prejudice any right which plaintiffs may have had prior to May 1, 1951, to a refund of the taxes sought to be recovered herein, or any other taxes heretofore paid by plaintiffs for which petitions for refund have been filed with the Tax Commission of the State of Washington.

Dated this 19th day of April, 1951.

(S.) Reuben C. Carlson, Attorney for Plaintiffs, E. I. *Du*Pont *De*Nemours and Company and General Electric Company. (S.) Smith Troy, Attorney General, (S.) C. John Newlands, Assistant Attorney General, Attorneys for defendant State of Washington.

[File endorsement omitted.]

[fols. 39-47] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 48] IN THE SUPREME COURT OF THE STATE OF WASHINGTON

GENERAL ELECTRIC COMPANY, a Corporation, Respondent,

v.

THE STATE OF WASHINGTON, Appellant

No. 31,962

EN BANC

OPINION—Filed April 14, 1953

This action was instituted by General Electric Company to recover from the state of Washington the sum of $938,437.25, with interest, representing business and occupation taxes paid. The court entered a judgment for the amount claimed. The state of Washington has taken this appeal.

Some years ago the United States constructed a plant at Hanford, Washington, for the manufacturing of fissionable material. In 1943, a contract was made with E. I. du Pont de Nemours and Company, Inc., a foreign corporation authorized to do business in the state of Washington, to carry on the manufacturing activity. The contract was negotiated and executed pursuant to the First War Powers Act of 1941. The question of liability to the state of Washington for the payment of business and occupation taxes was considered. The record indicates the corporation was seeking ways and means whereby in the performance of its contract with the United States it might be able to avoid payment of such taxes. A suggested method was the insertion in the contract of an agency clause, but this was not done. The thought was expressed that the attendant difficulties would more than offset the comparatively small tax saving involved.

[fol. 49] The corporation and the United States sought a ruling from the state tax commission upon the question whether in performing its contract the corporation would be engaged in such a business activity that it would be amenable to the business and occupation tax, and also whether in the performance of the contract it would be an instrumentality or agency of the United States. It was

recognized that the performance by a private corporation of a contract with the United States did not grant it immunity from a business and occupation tax, and the reason assigned was that the incidence or impact of the tax was not upon the operations of the corporation as an agency or instrumentality of the United States, but upon the corporation in its private capacity. It appears from the record that this recognition was based upon rules pronounced in Silas Mason Co. v. Tax Commission, 302 U. S. 186, 82 L. Ed. 187, and James v. Dravo Contracting Co., 302 U. S. 134, 82 L. Ed. 155. The tax commission made a ruling that the corporation would not be an agency or instrumentality of the United States in the performance of its contract, would not be immune from such tax, and that it would be engaged in a business activity within the meaning and intent of Laws of 1935, chapter 180, p. 706, as amended (RCW 82.04).

Respondent is the successor of the du Pont company. It is a foreign corporation, is authorized to transact business in this state, and is normally subject to its business and occupation tax. As a part of its business, the corporation manufactures fissionable material and uses specially constructed facilities owned by the United States.

The following statutes are a part of our business and occupation tax laws:

[fol. 50] " 'Business' includes all activities engaged in with the object of gain, benefit, or advantage to the taxpayer or to another person or class, directly or indirectly." (RCW 82.04.140.)

" 'Engaging in business' means commencing, conducting, or continuing in business and also the exercise of corporate or franchise powers as well as liquidating a business when the liquidators thereof hold themselves out to the public as conducting such business." (RCW 82.04.50.)

" 'Manufacturer' means every person who, either directly or by contracting with others for the necessary labor or mechanical services, manufactures for sale or for commercial or industrial use from his own materials or ingredients any articles, substances or commodities. When the owner of equipment or facilities furnishes, or sells to the customer prior to manufacture, all or a portion of the mate-

rials that become a part of whole of the manufactured article, the tax commission shall prescribe equitable rules for determining tax liability." (RCW 82.04.110).

"'To manufacture' embraces all activities of a commercial or industrial nature wherein labor or skill is applied, by hand or machinery, to materials so that as a result thereof a new, different or useful article of tangible personal property or substance or trade or commerce is produced and shall include the production or fabrication of special made or custom made articles." (RCW 82.04.120.)

In September 1946, respondent entered into a contract with the United States pursuant to the authority given by the First War Powers Act of 1941. In June 1947, respondent and the United States made a supplemental contract pursuant to authority given to the latter by the Atomic Energy Act of 1946 (Public Law No. 585, 79th Congress, 60 Stat. 755, 765, 766, 42 U. S. C. A. 803, 819, 820, § 1809(b)). The courts of this state have been asked in this action to construe the contract between respondent and the United States and determine whether one of the activities in which the respondent is engaged, the manufacturing of fissionable material, is that of the Atomic Energy Commission or its own activity.

Because of the secrecy necessarily surrounding the manufacturing process in which respondent is engaged, it has agreed in its contract to submit to many contractual conditions with reference to supervision by government agents [fol. 51] in the purchase of supplies and equipment, in fiscal affairs and in many other respects not necessary to set forth, none of which, however, are inconsistent with or change the status of respondent as one engaged in business as a manufacturer, as defined by statute.

It is the contention of respondent that, by the terms of its contract with the United States, a relationship has been created whereby it must be said that the manufacturing business in which it is engaged is that of the governmental agency, and, therefore, it is immune from the business and occupation tax by virtue of § 9(b) of the Atomic Energy Act of 1946. The part of § 9(b) relied upon reads:

"The Commission, and the property, activities, and income of the Commission, are hereby expressly exempted

from taxation in any manner or form by any State, county, municipality, or any subdivision thereof . . ."

The respondent cites and relies upon the cases of Roane-Anderson Co. v. Carson, 192 Tenn. 150, 239 S. W. (2d) 27, and Carson v. Roane-Anderson Co., 342 U. S. 232, 96 L. Ed. 257. We do not think the statute or the cited cases meet the question we have before us in this case, or that we should feel bound by the decision of the United States Supreme Court. In that case and the Tennessee case being reviewed, sales and use taxes were involved. The Tennessee court found as a fact that the goods sold and purchased became the property of the Government and were in reality paid for by Government money; hence, they were not subject to the Tennessee sales and use tax. The United States Supreme Court accepted the findings of fact made by the Tennessee court and affirmed its judgment. The Supreme Court of Arkansas has recently decided in a similar case that if the contractor is the purchaser of the goods, a sales tax is collectible; but if the United States is such purchaser, the taxes are not collectible; also, that [fol. 52] who is the purchaser of the goods, is a question to be determined by state law, upon which subject only the courts of the state can speak with final authority. Parker v. Kern-Limerick, Inc. — Ark. —, 254 S. W. (2d) 454. The court cited Alabama v. King & Boozer, 314 U. S. 1, 86 L. Ed. 3, holding to the same effect.

The questions before us are purely domestic and must be determined by a construction of the contract and the application of our statutes. The part of the Atomic Energy Act above quoted is not before us for construction or application and does not affect respondent or appellant. The governmental agency is not carrying on any activity in connection with the manufacturing business or respondent, and therefore § 9(b) of the act has nothing to do with the legal questions we have under consideration. The incidence or impact of the tax falls only on respondent as a business corporation and not as an agency or instrumentality of the United States. The act does not in any way attempt to affect the operation of the business and occupation tax upon those who engage in manufacturing in this state, even though they may do so pursuant to a

contract with the United States. If it did so, a very serious constitutional question involving the power of the United States to restrict the right of this state to impose such a tax upon those who exercised the privilege of doing business within its borders would be raised.

The manufacturing of fissionable material by respondent is done by it, not as an agent or instrumentality of the United States, but as a part of its authorized corporate functions. The taxpaying status of respondent must be determined by our statutes, and not by any status or relationship attempted to be created by contract. It is the nature of the business done by respondent in this state that [fol. 53] must determine its taxpaying status and not what it may denominate itself in its contract. The adroit use of words and phrases in the contract by which it is sought to establish a relationship between itself and the governmental agency whereby its manufacturing business and activity can be said to be that of the agency is of no avail.

Reduced to its simplest form, we have a business corporation engaged in manufacturing a high explosive and delivering its product to a governmental agency. Our statute authorizes the imposition of a business and occupation tax for the privilege of carrying on such an activity in this state. The facts that respondent uses buildings and facilities of the agency, that by contract it has submitted to certain supervision, and that special fiscal arrangements are provided for, do not make such activities those of the governmental agency, nor do they make respondent such an instrumentality of the United States or of the agency that it is immune, expressly or impliedly, from the business and occupation tax.

The reasoning of the court in the case of Carson v. Roane-Anderson Co., 342 U. S. 232, 96 L. Ed. 257, and in Roane-Anderson Co. v. Carson, 192 Tenn. 150, 239 S. W. (2d) 27, is unsound when applied to the situation presented by the record in this case. We find no reason based either on § 9(b) of the Atomic Energy Act or the foregoing cases to depart in any way from what we decided in Mason, Inc., v. State Tax Comm., 188 Wash. 98, 61 P. (2d) 1269. The constitutional right of the state of Washington to exact a business and occupation tax from a corporation given the privilege of doing business within its boundaries and hav-

from taxation in any manner or form by any State, county, municipality, or any subdivision thereof . . ."

The respondent cites and relies upon the cases of Roane-Anderson Co. v. Carson, 192 Tenn. 150, 239 S. W. (2d) 27, and Carson v. Roane-Anderson Co., 342 U. S. 232, 96 L. Ed. 257. We do not think the statute or the cited cases meet the question we have before us in this case, or that we should feel bound by the decision of the United States Supreme Court. In that case and the Tennessee case being reviewed, sales and use taxes were involved. The Tennessee court found as a fact that the goods sold and purchased became the property of the Government and were in reality paid for by Government money; hence, they were not subject to the Tennessee sales and use tax. The United States Supreme Court accepted the findings of fact made by the Tennessee court and affirmed its judgment. The Supreme Court of Arkansas has recently decided in a similar case that if the contractor is the purchaser of the goods, a sales tax is collectible; but if the United States is such purchaser, the taxes are not collectible; also, that [fol. 52] who is the purchaser of the goods, is a question to be determined by state law, upon which subject only the courts of the state can speak with final authority. Parker v. Kern-Limerick, Inc. — Ark. —, 254 S. W. (2d) 454. The court cited Alabama v. King & Boozer, 314 U. S. 1, 86 L. Ed. 3, holding to the same effect.

The questions before us are purely domestic and must be determined by a construction of the contract and the application of our statutes. The part of the Atomic Energy Act above quoted is not before us for construction or application and does not affect respondent or appellant. The governmental agency is not carrying on any activity in connection with the manufacturing business or respondent, and therefore § 9(b) of the act has nothing to do with the legal questions we have under consideration. The incidence or impact of the tax falls only on respondent as a business corporation and not as an agency or instrumentality of the United States. The act does not in any way attempt to affect the operation of the business and occupation tax upon those who engage in manufacturing in this state, even though they may do so pursuant to a

contract with the United States. If it did so, a very serious constitutional question involving the power of the United States to restrict the right of this state to impose such a tax upon those who exercised the privilege of doing business within its borders would be raised.

The manufacturing of fissionable material by respondent is done by it, not as an agent or instrumentality of the United States, but as a part of its authorized corporate functions. The taxpaying status of respondent must be determined by our statutes, and not by any status or relationship attempted to be created by contract. It is the nature of the business done by respondent in this state that [fol. 53] must determine its taxpaying status and not what it may denominate itself in its contract. The adroit use of words and phrases in the contract by which it is sought to establish a relationship between itself and the governmental agency whereby its manufacturing business and activity can be said to be that of the agency is of no avail.

Reduced to its simplest form, we have a business corporation engaged in manufacturing a high explosive and delivering its product to a governmental agency. Our statute authorizes the imposition of a business and occupation tax for the privilege of carrying on such an activity in this state. The facts that respondent uses buildings and facilities of the agency, that by contract it has submitted to certain supervision, and that special fiscal arrangements are provided for, do not make such activities those of the governmental agency, nor do they make respondent such an instrumentality of the United States or of the agency that it is immune, expressly or impliedly, from the business and occupation tax.

The reasoning of the court in the case of Carson v. Roane-Anderson Co., 342 U. S. 232, 96 L. Ed. 257, and in Roane-Anderson Co. v. Carson, 192 Tenn. 150, 239 S. W. (2d) 27, is unsound when applied to the situation presented by the record in this case. We find no reason based either on § 9(b) of the Atomic Energy Act or the foregoing cases to depart in any way from what we decided in Mason, Inc., v. State Tax Comm., 188 Wash. 98, 61 P. (2d) 1269. The constitutional right of the state of Washington to exact a business and occupation tax from a corporation given the privilege of doing business within its boundaries and hav-

ing a contract with the United States was sustained on appeal. Silas Mason Co. v. Tax Commission, 302 U. S. 186, 82 L. Ed. 187.

[fol. 54] The judgment is reversed and the case remanded for the entering of an order dismissing the action.

Thomas E. Grady.

We concur:

Mallery, J.; Hill, J.; Hamely, J.; Weaver, J.; Olson, J.

[fol. 55] FINLEY, J. (dissenting):

Section 9(b) of the atomic energy act of 1946 (Public Law No. 585, 79th Congress, 60 Stat. 755, 765, 766, 42 U. S. C. A. 803, 819, 820, § 1809(b), in part, reads:

"The Commission, and the property, *activities*, and income of the Commission, are hereby expressly *exempted from taxation in any manner or form* by any State, county, municipality, or any subdivision thereof . . ." (Emphasis supplied.)

Italicized and mentioned particularly here at the start of this discussion is the fact that the exemption from taxation, contemplated by § 9(b), is from *"taxation in any manner or form by any State, county, municipality, or any subdivision thereof."* Of even further significance is the decision of the United States Supreme Court in *Carson v. Roane-Anderson Co.*, 342 U. S. 232, 96 L. Ed. Adv. Opin. 198, and its controlling effect here respecting disposition of the instant appeal. In *Carson*, the court, in the broadest of language, recently construed § 9(b), and invalidated a Tennessee sales and use tax (as applied to certain taxpayers) on the ground that *activities* of the atomic energy commission were involved.

The question in the instant case is whether the above legislation *prevents imposition of the business and occupation tax* of the state of Washington upon the General Electric Company, a New York corporation. The tax is occasioned and its amount is measured, in effect, by the corporation's operations in this state (pursuant to its contract with the atomic energy commission), *as the operator of the atomic energy plant at Hanford, Washington, and the*

related facilities thereof for the United States Government.

The majority opinion brushes aside any suggestion that § 9(b) and the Carson case are controlling. It is said that [fol. 56] the instant case must be decided on the basis of state statutes, and that no Federal statute is involved. This I cannot follow or understand. I certainly recognize the general principle—that interpretations of state statutes by the supreme court of this state are controling, under certain circumstances. However, this assumes the absence of any applicable valid Federal statute, power or authority. Applying the above general principle is begging the question, if, in fact, a valid Federal statute is applicable. Here in the instant case, it seems crystal clear to me that § 9(b) does apply; particularly, because of the manner in which it has been construed in the *Carson* case. The majority cite and rely upon *Silas Mason Co. v. Tax Commission*, 302 U. S. 186, 82 L. Ed. 187, in support of the proposition that the state of Washington can constitutionally impose its business and occupation tax upon a corporation doing business in the state in the performance of a contract with the United States government. I have no quarel with the *Mason* case whatsoever. But in the instant case, something new has been added—namely, the enactment of § 9(b), and the assertion thereby of a Federal power, absent in the *Mason* case. It appears to me that the *Mason* case is distinguishable, and that it simply is not applicable to the instant case. *Parker v. Kern-Limerick, Inc.*, — Ark. —, 254 S. W. (2d) 454, is cited by the majority. Basically, the *Parker* case is subject to the same analysis and criticism as the majority opinion herein.

Now to get back to some further pertinent, explanatory facts. The corporation is in all respects qualified to do business within the state of Washington. Its contract with the government was (1) entered into on May 15, 1946, under [fol. 57] authority of the First War powers act, 1941 (Public Law No. 354, 77th Congress, Dec. 18, 1941); (2) subsequently, formally approved and adopted by the atomic energy commission on January 28, 1947, under authority granted to the commission by the atomic energy act of 1946. The superior court for Thurston county held that § 9(b) prohibited imposition of the tax. Judgment was entered, ordering the state to refund the tax paid by the corporation

in the sum of $938,437.25, plus interest thereon. The state of Washington has appealed.

For a variety of reasons, the costs of government have rocketed to astronomic levels in recent years. Without debating the "pros" or "cons" of this economic phenomenon of modern life, it can be said quite impartially, and with little fear of contradiction, that the problems of finding sources of revenue, ways and means of imposing and collecting taxes to meet the costs of government, have become most difficult. This is particularly true at the state and other local levels of government. Overlapping and duplication, double, or perhaps treble, taxation with respect to particular items of property, and competition for tax revenue between taxing authorities, complicate matters further and to a very considerable degree. In this setting, the instant case comes to this court. Apparently, the Federal government is concerned, and legal counsel for the United States government have sought to assist respondent corporation in escaping liability for payment of the tax. The amount presently involved is significant. Future and further implications are even more significant. The State of Washington is concerned and quite naturally is resisting this potential loss of tax revenue.

[fol. 58] As an abstract proposition, our interest and sympathy may support the official policy taken in this matter by the state of Washington. However, it is obviously the duty of this court to decide the case on the basis of legal principles—personal inclinations, sympathies, or interests to the contrary, notwithstanding.

The potential loss of tax revenue to the state of Washington is serious. It would be even more shocking, except for the fact that the state does benefit tax-wise in other respects most significantly, as a result of the operations of the Federal government's atomic energy plant at Hanford, Washington. Among other things to be noted is the large personnel payroll, most of which is expended by employees in this state for cost-of-living items and for other lesser luxuries which they can afford. The circulation of this payroll, its momentum and impact upon our total sales and other tax revenues, is considerable.

Counsel for respondent concede the status of the corporation is that of an independent contractor. But the pro-

visions of the contract could be construed to place respondent in the category of an agent of the Federal government. It can be readily seen that the contract between the respondent corporation and the government provides for the strictest supervision by the atomic energy commission for work done, acts performed, and services rendered by the corporation in its performance of obligations required of it under the contract. In connection with this aspect of the matter, certain findings of the trial court seem most significant. These are quoted at some length, as follows:

[fol. 59] "V. That in the course of performance required by the Contract, the Plaintiff was required to and did expend large sums of money from funds created by advances and current reimbursements thereto from the United States of America and money collected on behalf of the United States from private persons, firms and corporations, which monies were applied to the performance of the Contract, and Plaintiff has continued to receive such reimbursements throughout the entire period of performance.

"The Plaintiff Contractor was not and is never required to utilize its own funds. The tax collected by the State has been measured by the total amount of reimbursements for labor and materials, that is, the cash paid into Plaintiff's account by the United States, the funds received by the Plaintiff from third parties and deposited in the account, and credits received through payroll deductions. From the fund so created the Plaintiff pays the salaries of its employees, the cost of materials procured for the work and any and all other expenses incurred under the Contract.

"VI. That from the date of the Plaintiff's entry upon the performance of the Contract, and continuously since, the Tax Commission of the State of Washington has held that the amounts received by Plaintiff (as hereinbefore set forth), are includable in its gross income for the purpose of computing the measure of the tax payable under the provisions of Title II of the Revenue Act of 1935, as amended, entitled Business and Occupation Tax, being Section 8370-4 to and including Section 8370-15 of Remington's Revised Statutes of Washington, as amended to date,

and has demanded of Plaintiff payment in full of the tax so levied.

". . .

"VIII. That under its Contract the Plaintiff was obligated to:

"1. Manage and operate all the fissionable material production facilities of the project.

"2. Manage and operate the Village of Richland and the construction camp community at North Richland, providing all necessary municipal facilities and services at Government expense and serving as agent for the Government for all real estate which comprises the communities.

"3. Construct or provide for the construction of all plants and facilities needed for manufacturing processes and facilities related thereto and construct or provide for the construction of residential communities and other facilities necessary for the functioning of the communities.

"4. Provide all architect-engineer services in connection with the foregoing.

"5. Conduct development and research relative to production of fissionable materials.

"IX. That under the terms, covenants and conditions of said Contract the Plaintiff is to be reimbursed for all costs of whatever nature incurred under the Contract, and to receive as its sole payment at the completion of the Contract a fixed fee of One Dollar ($1.00).

[fol. 60] "X. That by virtue of the terms of the Atomic Energy Act of 1946, as amended, and the Contract, all property and equipment utilized by the Plaintiff in the production and construction contemplated under the Contract, title to all drawings, designs and specifications created under the Contract and complete control over the product, and all its component parts, while in process and after manufacture, vests in the Atomic Energy Commission, and patents to all processes and designs conceived or developed under the Contract are owned by the Atomic Energy Commission or are assignable to it, if the Atomic Energy Commission desires.

"XI. That the Plaintiff prepares preliminary studies, final designs, costs estimates, supervises all construction

work, makes appropriate field tests, submits progress reports, and performs all other architectural and engineering services required by the Contract, either subject to the approval or at the direction of the Atomic Energy Commission.

"XII. That the Atomic Energy Commission reserves the right to furnish any or all of the materials and equipment in accordance with the Contract.

"XIII. That the Plaintiff must obtain the prior approval or ratification of the Atomic Energy Commission for all purchases or contracts over Five Thousand Dollars ($5,000.00), (and in the case of construction over Two Thousand Dollars ($2,000.00)).

"XIV. 1. That the Plaintiff is required to get approval of the Atomic Energy Commission before purchasing or utilizing materials, supplies, and equipment of its own manufacture, when the price is Two Hundred Fifty Dollars ($250.00), or over.

"2. That the Hanford Operations Office of the Atomic Energy Commission at all times maintains constant supervision of the Plaintiff's actions in the performance of the Contract.

"3. That the Plaintiff is subject to the administrative and technical procedures prescribed by the Atomic Energy Commission in the construction, operation and research phases of the Contract.

"4. That the Atomic Energy Commission has the right to pay directly to third parties all sums due for labor, material and other charges arising from the Contract.

"5. That all construction subcontracts are subject to the approval of the Atomic Energy Commission.

"6. That all subcontracts for the operation, research development, and production processes require the prior approval or ratification of the Atomic Energy Commission.

"7. That production schedules are prescribed by the Atomic Energy Commission.

"8. That all work and services of the Plaintiff under the terms of the Contract are subject in all respects to the approval of the Atomic Energy Commission.

"XV. That the area known as the Hanford Works, which is the situs of the Plaintiff's operation and performance of the Contract, was obtained by the Government for the sole

purpose of constructing and operating the Government's atomic energy plant. Certain basic requirements make the area geographically desirable. The Government acquired by purchase or condemnation all of the land, something in [fol. 61] excess of 400,000 acres, on which the communities and plants were built. Although the Government did not take exclusive jurisdiction of the area, all unauthorized persons are excluded from the area, with the exception of the village of Richland and the community of North Richland. All ingress and egress of people is controlled and only permitted to those with official business who have obtained security clearance in accordance with the requirements of Section 10 of the Atomic Energy Act. In addition to the controls on the ground that have been established by Public Proclamations 18 and 28, dated July 14, 1943, and November 12, 1946, respectively, issued by the Commanding Officer, Western Defense Command and by Headquarters. Sixth Army, respectively, the President of the United States on January 17, 1948, by Executive Order No. 9925 established air space reservation over the Hanford Works at Richland, Washington. Thus, complete control by the Government over the area is exercised. Practically all of the buildings on the land comprising the area known as the Hanford Works, including the village of Richland, were either built for, have been purchased by, or belong to the Government.

"XVI. That Plaintiff performs all the municipal activities for the area included within the Hanford Works, particularly for the community of Richland. It constructs roads necessary for the prosecution of the work and maintains these roads. Further, the General Electric Company, at the direction of the Government, has provided school facilities, police and fire protection, sewage, lighting, town bus system, dormitories, and a hospital, all of which are Government-owned. The Plaintiff manages and maintains housing facilities in the Hanford Works area and grants licenses and leases to persons, firms and corporations for the operation of businesses and commercial enterprises for the benefit of personnel located on or connected with the project. The General Electric Company collects the revenue from such license and lease arrangements for and on behalf of the Government. Under its Contract, the General

Electric Company provides these services and executes the necessary contracts for housing, licenses, leases and concessionaire agreements as agent of the Government. The Plaintiff has so acted at all times in its management of the Government properties and received reimbursements therefor, which are asserted by the Defendant to be taxable under the Washington State Business and Occupation Tax (Rule 223, Rules Relating to the Revenue Act). The General Electric Company owns none of the real or personal property which it operates and manages in the performance of its Contract.

". . .

"XX. That the Contract is to be performed entirely at the expense of the Government and the contractor is not to be liable for and the Government shall indemnify and hold the contractor harmless against any delay, failure, loss, expense (including the expense of litigation) or damage (including personal injuries and deaths of persons and damage to property) of any kind and for any cause whatsoever arising out of or connected with the work and whether or not any employee or employees of the contractor is responsible therefor, unless such delay, failure, loss, [fol. 62] expense or damage has been established by the Government to have been caused directly by bad faith or wilful misconduct on the part of certain named corporate officers of the contractor within the scope of his or their authority and employment. This provision, which is an extraordinary provision in Government contracts, was approved by the President of the United States as it originally appeared in the contract between the du Pont Company and the Manhattan Engineer District. Further, it is provided that the Government shall assume and carry on the defense of all claims, suits or legal proceedings which might be asserted against the contractor on account of acts or omissions in the performance of the work, and that the Government shall pay directly and discharge completely all final judgments entered against the contractor in such litigation or claims which are settled by agreement approved by the contracting officer.

"XXI. That salaries and expenses of the company's employees are paid by the Government. These salaries are

subject to the approval of the contracting officer. When, in the opinion of the contracting officer, the Plaintiff's personnel or overhead is excessive for the proper performance of the Contract, reductions are to be made as required by the contracting officer, subject to the right of appeal by the contractor pursuant to the "Disputes" article of the Contract.

"XXII. That the contractor is required to dismiss employees deemed by the Government to be incompetent, careless, insubordinate, or whose continued employment is deemed to be inimical to the public interest.

". . .

"XXIV. That under the Contract the General Electric Company provides the personnel and certain technical experience and the Government provides the facilities, money, and upon consultation with the contractor, formulates the policies and programs to be carried out, subject to the controls under the program by the Executive and Legislative Branches of the Government as set forth in the Atomic Energy Act. The actual plant operations are carried on by the employees of the Plaintiff under the general supervision of the Government, and subject to and in accordance with policies and instructions from the Government. At all times there is a very close coordination between the General Electric Company and the Government."

The business and occupation tax has been imposed and collected by the state of Washington under the applicable provisions of the revenue act of 1935. The Washington state tax commission periodically has measured the tax to be paid on the basis of the total annual sums paid by the United States Government to the corporation. Such sums cover costs of labor, material, supplies and services employed or used by the corporation in connection with its [fol. 63] operations under the terms of the contract with the government. The state contends, among other things, that the tax or its incidence falls upon the corporation rather than upon the United States government; that the United States government, the atomic energy commission, or the activities thereof, are not taxed. In support of this

contention, the state relies upon Rem. Rev. Stat. (Sup.), § 8370-14, which reads as follows:

"Purpose of title. It is not the purpose of this title that the taxes herein levied upon persons engaging in business shall be construed as taxes upon the purchasers or customers, but it is the intention that such taxes shall be levied upon, and collectible from, the person engaging in the business activities herein designated and that such taxes shall constitute a part of the operating overhead of such persons engaging in business."

Confronted with the opinion of the United States supreme court in *Carson* v. *Roane-Anderson Co., supra,* the technical distinction urged by the state, and the argument or legal conclusion based thereon, appear to me to be of no consequence, whatsoever, in the instant case. If the United States Congress has the power to immunize respondent corporation from state taxation; if the performance by respondent of its contract with the United States government constitutes "activities" of the atomic energy commission, as the term "activities" is used in § 9(b); or, if the decision of the United States supreme court in *Carson* v. *Roane-Anderson Co., supra,* establishes an immunity from state taxation under § 9(b) sufficiently broad to encompass respondent's activities in the state of Washington; then, most certainly, the above-mentioned contentions of the state are of no avail.

It may be of some interest to note that the opinion was [fol. 64] rendered in the *Carson* case after the superior court for Thurston county rendered its decision in the instant case. Furthermore, after the opinion of the United States supreme court was rendered in the *Carson* case, knowledge of its implications as to state tax revenues was received with much apprehension by various chief state executives and other state officials. This is evidenced by the government's printed report entitled, "Hearing before the Joint Committee on Atomic Energy Congress of the United States on State Taxation of Atomic Energy Commission Contractors," dated April 24, 1952. Contained in the report is a letter from Governor Arthur B. Langlie, of the state of Washington, addressed to members of the joint

committee on atomic energy of the congress. It reads, in part, as follows (p. 38):

"Dear Senator: I feel it my urgent duty as Governor of the State of Washington to bring to your attention the possible consequences of the decision handed down by the Supreme Court of the United States on January 7, 1952, in the cases of *Carson* v. *Roane Anderson Co. and Carson* v. *Carbide & Carbon Corp.* and to request you, as a member of the Joint Congressional Committee on Atomic Energy, to lend your every effort in obtaining the necessary congressional action correcting or clarifying section 9(b) of the Atomic Act of 1946.

". . . The matter for greatest concern is the fact that the Court accepted the Government's proposition that Congress, by the use of the word 'activities' in said section 9(b), intended to grant a tax exemption to private independent contractors. *Under this decision there seems little escape from the conclusion that private independent contractors with the Atomic Energy Commission may now be completely immune from all State and local taxation.*

"While the Roane-Anderson case deals with sales and use taxes, *yet there is no limitation of the exemption indicated in the opinion.* If 'activities' refers to contractors' activities, then by literal application of the statute, these contractors 'are hereby expressly exempted from taxation in any manner or form by any State, county, municipality, or any subdivision thereof.' Real and personal property taxes, income taxes, unemployment compensation and other [fol. 65] payroll taxes, business and occupation taxes and other franchises, and all similar levies would thus be included within the scope of the exemption. Some apprehension has been further voiced that the decision might be equally applicable to sub-contractors, sub-subcontractors, and even those who merely sell merchandise to those involved in the performance of contracts.

". . . If the Roane-Anderson Co. decision is held to be controlling the State will be required to refund approximately $11/4 million and should the doctrine of that case be extended to subcontractors the State's tax problem would be multiplied many times over. There is the even more

serious possibility that the right of the State to collect various payroll taxes will be imperiled . . .

"In my view, the interpretation of the Court is a most serious interference with State and local tax powers. If this principle is extended to apply to other types of Federal contractors, it means that a substantial part of the State and local tax base has been swept out of existence. Fundamentally, the principle of concurrent powers of taxation in the Federal and State governments is implicitly denied by the Court's interpretation. . . ." (Emphasis supplied)

Much in the same vein is a letter from Governor Adlai E. Stevenson, of the state of Illinois, which appears in the same report at p. 1, and in part, reads as follows:

"On January 7 last, the United States Supreme Court held, in the cases of *Carson v. Roane-Anderson Company* and *Carson v. Carbide and Carbon Corporation*, that the word 'activities' in section 9(b) of the Atomic Energy Act of 1946 covered private persons and corporations doing work for the Atomic Energy Commission on an independent contractual basis in such manner that the sales and use taxes of the State of Tennessee could not be applied in those cases. The issue of constitutional power was not involved in the cases and the Court merely held that the Congress, in the section quoted, intended to extend tax immunity to these contractors.

"Because of the magnitude of the operations of the Atomic Energy Commission, and also because of the thrust of the Supreme Court's holding would not appear to be necessarily confined merely to sales and use taxes, the States generally have been quite alarmed by this decision. Their researches suggest that perhaps Congress really did not intend to create any such immunity, and this squares with previous efforts on the part of the Congress to resist efforts to extend the tax immunity of the Federal Government to its contractors. You will recall that, throughout the last war, it was the Federal policy not to allow contractors with the Federal Government to share its immunity from State taxes.

"Those States which happened to have representatives

on the Joint Committee on Atomic Energy have been asked to assist in seeking clarification of congressional policy on [fol. 66] this matter and, if it meets with the true congressional intent, to suggest an amendment of the law which will accurately reflect that intent. One way to do this, of course, would be to strike from section 9(b) the word 'activities' which, it can be readily seen, is a word of confusing breadth and which may not be a happy choice to convey the true desires of Congress in this regard. I am sure that all of the States, including Illinois, will greatly appreciate your active consideration of this problem."

In the *Carson* case, commenting on the Tennessee tax statutes there involved, the United States supreme court said (p. 233):

"The Retailers' Sales Tax Act of Tennessee, Ten. Acts 1947, c. 3, imposes a sales tax on the sale of goods in Tennessee and a use tax on the use within the state of goods purchased elsewhere. Tennessee collected these taxes from respondents who paid them under protest and then brought these suits to recover them and to enjoin future collections. Two of the respondents are private companies who are contractors for the Atomic Energy Commission and who paid use taxes; two are merchants who paid sales taxes on sales to those contractors and who passed the taxes on to them. The use taxes and the sales taxes were on articles used by the contractors in the performance of their contracts with the Commission."

At this point we note that the Tennessee supreme court held (*Roane-Anderson v. Carson*, 192 Tenn. 150, 239 S.W. (2d) 27), that the particular taxes of that state were not prohibited by the United States Constitution, *but were forbidden by § 9(b) of the atomic energy act.*

As to the power of congress to provide an immunity from state taxation, in *Carson v. Roane-Anderson Co., supra*, the United States supreme court said (p. 233):

". . . The constitutional power of Congress to protect any of its agencies from state taxation . . . has long been recognized as applying to those with whom it has made authorized contracts. See *Thomson v. Pacific R. Co.*, 9 Wall.

579, 588-589; *James v. Dravo Contracting Co.*, 302 U. S. 134, 160-161."

The United States supreme court further said (p. 234):

[fol. 67] "*. . . Certainly the policy behind the power of Congress to create tax immunities does not turn on the nature of the agency doing the work of the Government. The power stems from the power to preserve and protect functions validly authorized (Pittman v. Home Owners' Corp., supra,* p. 33)*—the power to make all laws necessary and proper for carrying into execution the powers vested in the Congress.* U. S. Const., Art. I, § 8, cl. 18. Hence if the present contracts which the respondent contractors have with the United States, and the performance thereunder, are 'activities' with the meaning of § 9(b) of the Act, the immunity is clear. Our view is that they are and that the judgments below must be affirmed." (Emphasis supplied.)

Referring to the legislative history of the atomic energy act, the United States Supreme Court continued (p. 234):

". . . The question whether the Commission should be empowered to employ private contractors in performance of its functions or whether the Commission should itself be the entrepreneur was an issue of national policy much discussed and debated at the time the legislation was before the Congress."

It is pointed out in the opinion that Congress determined it would be our national policy to permit the atomic energy commission to contract with and to use private contractors and their know-how to assist the commission in the conduct of its affairs. The court, referring to the commission, said (p. 235):

". . . Its activities may, in other words, be performed by it directly or through the agencies of private enterprise."

As to the interpretation and application of the term "activities," used in § 9(b), the court said (p. 235):

"Congress uses the word 'activities' in various sections of the Act, and seems each time to give it a broad sweep. The Congressional or Joint Committee constituted under § 15 is directed to study 'the activities' of the Commission.

The reports which the Commission is directed to submit to Congress pursuant to § 17 concern its 'activities.' Section 9(b) authorizes the Commission to make payments to state and local governments in lieu of property taxes in those areas 'in which the activities of the Commission are carried on and in which the Commission has acquired prop- [fol. 68] erty' previously subject to local taxation. *In none of these sections do we find any suggestion that 'activities' is used in a narrow sense to describe less than all of the functions of the Commission. The meaning of 'activities' as applied either to an individual or to a government agency may be broad enough to include what is done through independent contractors as well as through agents.* Certainly where the pattern of conduct visualized by the Act is the use of independent contractors or agents from the field of private enterprise, *the inference is strong that 'activities' means all authorized methods of performing the governmental function. We find no contrary evidence from the legislative history.*" (Emphasis supplied.)

I am convinced that in the *Carson* case the United States Supreme Court has laid down a policy of immunity from state taxation with a broad brush. Ours is a government of dual sovereignty—state and federal. In the very nature of things, we are bound by and must follow the decisions of the United States Supreme Court under the supremacy clause of the United States Constitution. The *Carson* case is controlling. It constitutes a compelling precedent and decides the basic questions raised in the instant case in a manner contrary to the contentions of the state of Washington. In this connection, it suggested that the authoritative interpretation of the Federal statute (§ 9(b) of the atomic energy act) by the United States Supreme Court calls into effect subsection (f) of Rem. Rev. Stat. (Sup.), § 8370-12 (our business and occupation tax statute), which reads:

"In computing tax there may be deducted from the measure of tax the following items:

". . .

"(f) Amounts derived from business which the State of Washington is prohibited from taxing under the constitu-

tion of this state or the constitution or laws of the United States."

There is one further point in this case. The tax immunity is established by § 9(b) as of the effective date of the [fol. 69] atomic energy act. Business transacted in this state by respondent corporation under its contract with the Federal Government *prior* to the effective date of the act, would be subject to the business and occupation tax of the state of Washington, under the decision in *Silas Mason Co. v. Tax Commission, supra.* With the exception of whatever difference this may make in the amount of the tax to be refunded, I think the judgment of the trial court should be affirmed.

Finley, J.

I concur.

Schwellenbach, J.

[fol. 70] Donworth, J. (dissenting):

I am in accord with the views expressed in Judge Finley's dissenting opinion but I wish to emphasize his reference to the supremacy clause of the United States Constitution because, in my opinion, we are bound by the interpretation which the United States Supreme Court placed upon the word "activities" in § 9(b) of the atomic energy act of 1946, in *Carson v. Roane-Anderson Co.*, 342 U. S. 232, 96 L. Ed. 257. To my mind this constitutional provision is the key to the solution of the problem presented in this case.

The contract between respondent and the atomic energy commission (described in the findings of the trial court) makes it very evident that respondent is merely spending money belonging to the United States in the manner directed by the commission. Respondent's actions pursuant to the contract are not its own but are in fact, as well as in law, activities of the commission. The relationship created by the contract differs materially from that which existed between the Government and the contractor in *Silas Mason Co. v. Tax Commission*, 302 U. S. 186, 82 L. Ed. 187, 58 S. Ct. 233, where the latter undertook to construct a certain dam and power house for a lump sum. In so doing the contractor expended its own funds and presumably realized a profit. Here respondent's actions are directly

controlled by the commission in the minutest detail and the only monetary compensation received by respondent for acting as the commission's agent is the sum of one dollar.

Article VI of the United States Constitution contains the supremacy clause which reads:

[fol. 71] "This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; *and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.*" (Italics mine.)

This provision means that, as a judge of this court, I am bound by the interpretation which the Supreme Court of the United State has placed upon the act of Congress involved in the case at bar. This statute in § 9(b) provides that ". . . the activities . . . of the commission are hereby expressly exempted from taxation in any manner or form by any state . . ."

The Supreme Court which is the final authority on the meaning of acts of Congress has given the term "activities" a broad interpretation and this is binding upon all state courts. Federal statutes must be uniformly construed throughout the United States both in Federal and state courts.

Therefore, under the supremacy clause the decision in the *Carson* case, *supra,* holding that the term "activities" in the atomic energy act means "all authorized methods of performing the governmental functions" compels an affirmance of the trial court's judgment.

The only remedy available to appellant is to seek redress from the Congress.

Donworth, J.

[fol. 72] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

[Title omitted]

PETITION FOR REHEARING—Filed May 6, 1953

To the Honorable Chief Justice and to the Associate Justices of the Supreme Court of the State of Washington:

Come now the General Electric Company, a corporation, the Respondent, by its counsel, Reuben C. Carlson, and the United States of America, Intervenor, by its counsel, H. Brian Holland, Assistant Attorney General of the United States, and Ellis N. Slack, Helen Goodner and Berryman Green, Special Assistants to the Attorney General, and respectfully petition this Honorable Court for a rehearing of this cause, and a reversal of the majority opinion thereof, and in support of their petition respectfully submit:

1. That the Court misapprehended the scope and effect of Section 9(b) of the Atomic Energy Act of 1946 (Public Law No. 585, 79th Congress, 60 Stat. 755, 765, 766, 42 U. S. C. A. 803, 819, 820, Sec. 1809(b)).

2. That the Court should have construed and applied Section 9(b) of the Atomic Energy Act of 1946 (Public Law No. 585, 79th Congress, 60 Stat. 755, 765, 766, 42 U. S. C. A. 803, 819, 820, Sec. 1809(b)), as that Section was construed and applied by the Supreme Court of the United States in the case of *Carson v. Roane-Anderson Co.*, 342 U. S. 232, [fol. 73] 96 L. Ed. 257, 72 S. Ct. 257.

3. That for the purpose of Section 9(b) of the Atomic Energy Act of 1946 (Public Law No. 585, 79th Congress, 60 Stat. 755, 765, 766, 42 U. S. C. A. 803, 819, 820, Sec. 1809(b)), there is no valid distinction to be made between a sales, or use, tax and the Washington State Business and Occupation Tax.

4. That this case arises out of the Respondent's performance of a contract with the Atomic Energy Commission entered into under the provisions of the Atomic Energy Act of 1946 (Public Law No. 585, 79th Congress, 60 Stat. 755, 765, 766, 42 U. S. C. A. 803, 819, 820, Sec. 1809(b)).

That, of necessity, the provisions of Section 9(b) of that Act are pertinent to the performance of that contract by the Respondent and protect both the Respondent and the Atomic Energy Commission from state and local taxation "in any manner or form" including the tax in question in this case.

5. That in its opinion the Court states (p. 4):

> It is the contention of respondent that, by the terms of its contract with the United States, a relationship has been created whereby it must be said that the manufacturing business in which it is engaged is that of the governmental agency, * * *.

and (p. 5):

> The manufacturing of fissionable material by respondent is done by it, not as an agent or instrumentality of the United States, but as a part of its authorized corporate functions. The taxpaying status of respondent must be determined by our statutes, and not by any status or relationship attempted to be created by contract. * * *

In the brief filed on behalf of the Respondent and the United States, Intervenor, in this case, it was stated (Respondent's brief, p. 30):

> For the purpose of the instant case, the respondent concedes (1) * * * and (2) that the respondent is an independent contractor, not an agent of the Commission.

6. The Court, in its opinion, states (p. 5):

> [fol. 74] The questions before us are purely domestic and must be determined by a construction of the contract and the application of our statutes. The part of the Atomic Energy Act above quoted is not before us for construction or application and does not affect respondent or appellant. The governmental agency is not carrying on any activity in connection with the manufacturing business of respondent, and therefore Section 9(b) of the act has nothing to do with the legal questions we have under consideration.

We submit that the Court has erred in making this conclusion under the law and facts existing in this cause.

7. It is respectfully submitted that under Article VI of the United States Constitution a valid Federal statute exempting the Respondent from the taxes involved is directly before this Court. That this statute has been broadly construed in the case of *Carson v. Roane-Anderson Co.*, 342 U. S. 232, 96 L. Ed. 257, 72 S. Ct. 257, and that the decision therein is binding upon this Court.

Wherefore, petitioners respectfully submit that a rehearing should be had and the majority decision herein should be reversed.

Respectfully submitted, Reuben C. Carlson, 1211 Rust Building, Tacoma, Washington, Attorney for General Electric Company; H. Brian Holland, Assistant Attorney General; Ellis N. Slack, Helen Goodner, Berryman Green, Special Assistant to the Attorney General, Department of Justice Building, Washington, D. C., Attorneys for Intervenor.

Acknowledgment of service—(omitted in printing).

[fol. 75] In the Supreme Court of the State of Washington

[Title omitted]

Order Denying Petition for Rehearing—Filed May 18, 1953

The court having considered the petition of the respondent General Electric Company and the intervener, United States of America, for a rehearing herein,

It Is Ordered that the petition for a rehearing be and it is hereby denied.

Dated this 18th day of May, 1953.

Thomas E. Grady, Chief Justice.

[File endorsement omitted.]

[fols. 76-78] IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 31962

Thurston County No. 24232

GENERAL ELECTRIC COMPANY, a Corporation, Respondent,

vs.

THE STATE OF WASHINGTON, Appellant

JUDGMENT—Monday, May 18, 1953

This cause having been heretofore submitted to the court, upon the transcript of the record of the Superior Court of Thurston County, and upon the argument of counsel, and the Court having fully considered the same and being fully advised in the premises, it is now, on this 18 day of May, A. D. 1953, on motion of Don Eastvold, Esquire, of counsel for appellant, considered, adjudged and decreed, that the judgment of the said Superior Court be, and the same is hereby reversed and the case remanded for the entering of an order dismissing the action; and that the said The State of Washington have and recover of and from the said General Electric Company, a corporation, the costs of this action taxed and allowed at Two hundred fifty-two and 25/100 ($252.25) Dollars, and that execution issue therefor. And it is further ordered, that this cause be remitted to the said Superior Court for further proceedings, in accordance herewith.

[fol. 79] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

[Title omitted]

ORDER OF STAY AND WITHHOLDING REMITTITUR—Filed May 19, 1953

Upon consideration of the records and files herein, it is hereby

Ordered that a stay of execution in the above entitled cause be and the same is hereby granted; be it further

Ordered that the Clerk of the Supreme Court of the State of Washington withhold sending of the remittitur to the Superior Court of Thurston County, Washington in the above entitled cause pending a review thereof by the Supreme Court of the United States; be it further

Ordered that this order shall be and remain in effect pending a final decision and review of the above entitled cause by the Supreme Court of the United States.

Dated at Olympia, Washington this 19th day of May, 1953.

Thomas E. Grady, Chief Justice of the Supreme Court of the State of Washington.

[fol. 80] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

[Title omitted]

PETITION OF GENERAL ELECTRIC COMPANY AND UNITED STATES OF AMERICA FOR APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed August 10, 1953

Considering themselves aggrieved by the final decree and judgment of this Court entered on April 14, 1953, and order denying petition for rehearing entered May 18, 1953, General Electric Company, respondent, and the United States of America, intervenor, do hereby pray that an appeal be allowed to the Supreme Court of the United States from

said final decree and judgment and order denying the petition for rehearing and from each and every part thereof; that citation be issued in accordance with law; that an order be entered with respect to the appeal bond to be given by said respondent; that the amount of security, if any, be fixed by the order allowing the appeal; and that the material parts of the record, proceedings, and papers upon which said final judgment and decree and order denying petition for rehearing were based, duly authenticated, be sent to the Supreme Court of the United States in accordance [fol. 81] with the rules in such cases made and provided.

Respectfully submitted, Robert L. Stern, Acting Solicitor General, Counsel for the United States; Reuben C. Carlson, Counsel for General Electric Company.

Acknowledgment of Service (omitted in printing)

[fol. 82] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

[Title omitted]

ORDER ALLOWING APPEAL—Filed August 10, 1953

General Electric Company, respondent, and United States of America, intervenor, having made and filed their joint petition praying for an appeal to the Supreme Court of the United States from the final decree and judgment of this Court in this cause entered on April 14, 1953, and order denying petition for rehearing entered May 18, 1953, and from each and every part thereof, and having presented their joint Assignment of Errors and prayer for reversal and their joint statement as to the jurisdiction of the Supreme Court of the United States on appeal, pursuant to the statutes and rules of the Supreme Court of the United States in such cases made and provided;

Now, therefore, it is hereby ordered, that said appeal be and the same is hereby allowed as prayed for.

It is further ordered, that the amount of the appeal bond [fols. 83-84] to be filed by the respondent be and the same is

hereby fixed in the sum of $500.00, with good and sufficient surety, and shall be conditioned as may be required by law.

It is further ordered that citation shall issue in accordance with law.

Thomas E. Grady, Chief Justice of the Supreme Court of the State of Washington.

August 10, 1953.

Acknowledgment of Service (omitted in printing).

[fol. 85] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed August 10, 1953

General Electric Company, respondent, and the United States of America, intervenor, in the above-entitled cause, in connection with their appeal to the Supreme Court of the United States hereby file the following assignment of errors upon which they will rely in their prosecution of said appeal from the final judgment and decree of the Supreme Court of Washington, entered April 14, 1953, and order denying petition for rehearing entered May 18, 1953.

The Supreme Court of the State of Washington erred:

1. In holding that Section 9(b) of the Atomic Energy Act of 1946, c. 724, 60 Stat. 755 (42 U. S. C. 1946 ed., Sec. 1809 (b)), was not before the court for construction or application.

2. In holding that the General Electric Company's contract with the Atomic Energy Commission, and its per-
[fol. 86] formance thereunder, did not render General Electric Company's operation of the Hanford Engineer Works an activity of the Atomic Energy Commission.

3. In holding that Section 9(b) of the Atomic Energy Act of 1946, did not prevent the State of Washington from imposing its business and occupation tax upon the General

Electric Company in its performance of its contract with the Atomic Energy Commission, under the provisions of Title II, c. 180, Revenue Act of 1935, as amended, 6 Revised Code of Washington (1951), Sections 82.04.010, *et seq.*

4. In holding that the business and occupation tax imposed by the State of Washington upon the General Electric Company under the provisions of Title II, c. 180, Revenue Act of 1935, as amended, was valid as applied.

5. In failing to hold that Title II, c. 180, Revenue Act of 1935, as amended, as here applied by the Tax Commission of the State of Washington to the General Electric Company is invalid as repugnant to Section 9(b) of the Atomic Energy Act of 1946.

6. In failing to hold that Title II, c. 180, Revenue Act of 1935, as amended, as here applied by the Tax Commission of the State of Washington to the General Electric Company is invalid as repugnant to, and violative of the Constitution of the United States.

7. In failing to hold that Section 9(b) of the Atomic Energy Act of 1946 exempts the General Electric Company from the Washington business and occupation tax in the performance of its contract with the Atomic Energy Commission.

[fols. 87-153] 8. In reversing the judgment of the Superior Court of Thurston County, Washington.

Wherefore, General Electric Company, respondent, and the United States of America, intervenor, pray that the final judgment and decree of the Supreme Court of the State of Washington be reversed, and for such other relief as the Court may deem fit and proper.

Robert L. Stern, Acting Solicitor General, Counsel for the United States; Reuben C. Carlson, Counsel for General Electric Company.

August 10, 1953.

Acknowledgment of Service (omitted in printing).

[fol. 154] Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 1-7] IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THURSTON COUNTY

GENERAL ELECTRIC COMPANY, a Corporation, Plaintiff,

vs.

THE STATE OF WASHINGTON, Defendant

No. 24232

STATEMENT OF FACTS

[fol. 8] April 12, 1949

CHARLES VANDENBULCK, being called as a witness on behalf of Plaintiff, after having first been duly sworn, testified as follows:

Direct examination.

By Mr. Carlson:

Q. Will you state your full name please?
A. Charles Vandenbulck.
Q. And where do you live, Mr. Vandenbulck?
A. Oak Ridge, Tennessee.
Q. And what is your present position with the Atomic Energy Commission?
A. I am special assistant to the manager of Oak Ridge operations of the Atomic Energy Commission.
Q. Now, will you very briefly outline to the Court the various positions that you have held in connection with the development of Atomic Energy right from the start, briefly however?
A. My first contact with the Atomic Energy project dates back to June, 1942. At that time I was employed by the engineer department as a chief field auditor for the Syracuse division of the corps of engineers. The organization eventually becoming known as the Manhattan Project was initiated at that time. Subsequently we moved to New York where the district came into existence by a special order issued by the corps of engineers which I believe made the effective date August 16, 1942. Our

headquarters remained in New York until August, '45, at which time we moved to Oak Ridge, Tennessee. During the entire period of the control of the project by the War [fol. 9] Department, or Manhattan District, the headquarters for all its field operations, which are essentially the same installations which the commission has under its control today, was exercised from Oak Ridge. In my association with the Manhattan District, I held various positions in the organization. I initially started out as commercial project auditor. Subsequently, in October of '42, I was commissioned in the army of the United States and carried on in the capacity of disbursing officer until February of '43 and became disbursing officer for the Manhattan project, which continued until I got out of the Army in August of '46. Until sometime in February of '44, at which time we made arrangement with the Army Finance Department to reimburse on a regional basis and thereby eliminate the difficulties involved in sending checks back and forth, I distributed all funds in connection with the project which were thus paid out of my account. In addition to the job of disbursing officer, I was also designated organizationalwise as the chief of the administrative division which encompassed the legal division, prepared all contracts and auditing division and various administrative services. Because of my initial association with the project, I participated in numerous negotiations of contracts prior to the final preparation and signing of the definitive document.

Q. Now, Mr. Vandenbulck, in that experience you have outlined, did you have occasion to come to Hanford, Washington and to become familiar in all respects with the construction and operation of that project?

[fol. 10] A. Yes, sir. I participated in the initial negotiations of the du Pont contract, beginning sometime in December of '42. The first contact with the du Pont Company was made by General Groves and after the du Pont Company had agreed to undertake this project, in my capacity of administrative officer I was drawn in to it for the gradual development of the definitive contract which would set forth the mutual agreement of the two parties

which made it necessary for me to go to the office of the du Pont Company in Wilmington and——

Q. Now, would the same question apply to the General Electric contract that was made with the Atomic Energy Commission?

A. Yes, sir, because I participated in the negotiations in the General Electric contract which started, I believe, in May of '46 and involved a number of trips to Schenectady from Oak Ridge headquarters and also to Hanford and I participated in the various negotiations that led to the final document.

Q. Now, Mr. Vandenbulck, I want to backtrack a little so the Court will get this picture very clearly. The Manhattan District was organized in 1942 as you have outlined. Just what did it have under its jurisdiction?

A. The Manhattan District was charged with the responsibility of developing the atomic bomb. That involved a tremendous amount of research, construction of a large production plant and various installations throughout the country and ultimate assembly of the finished product, the bomb, when it was delivered.

Q. Had there ever been an undertaking like it before in [fol. 11] the history in the United States, or world as far as you know?

A. There has not.

Q. Is it unique in many respects?

A. It is, in that it was undertaking a project which in the first year or two didn't have any indication that it might ever succeed. The uncertainty of transforming a laboratory concept to a production facility involved problems that at times seemed insurmountable.

Q. Was it possible to construct these plants as you would normally do in business?

A. No, it was not, because your normal business operation involves usually a laboratory model, then a partial or semi-works plant, ultimately you wind up with the production unit as you visioned it. In the case of the Manhattan project, in numerous instances we were faced with the necessity of conducting laboratory research, operating a pilot model and building the final plant at the same time.

Q. Now, prior to coming to the State of Washington, what developments had actually taken place in various parts of the United States under the Manhattan District?

A. Well, it has been established there are several items that can go to make up the components of the atomic bomb, one the plutonium and the other uranium 235. Oak Ridge was to carry on all production operations. As early as July of '42 the construction of the plant which is today known as the Electric Magnetic Separation Plant was started at Oak Ridge, Tennessee. Sometime in December of '42 there was started at Oak Ridge, Tennessee, the [fol. 12] plutonium process plant. That plant today is known as the Oak Ridge National Laboratory and the equipment and facilities that are produced are used for research only. After the laboratory plant was started, it was determined that it could not be built at that location because of the tremendous hazards involved in the undertaking. The Clinton Engineering Works, or now known as the Oak Ridge National Laboratory is approximately twenty-five miles from Knoxville, Tennessee, a city of 200,000 or more population and it was determined it was entirely too hazardous to place this operation that close to a town of that size. Therefore, a survey was made of other locations in the United States which eventually culminated in the site now known as the Hanford Works.

Q. Now, just at this point, Mr. Vandenbulck, roughly how much did it cost the United States Government to develop and produce the atomic bomb?

A. Well, you have seen publicity that indicated that the President, at the time he authorized the project took a calculated risk to the tune of $2,000,000,000. Of course, there is a great residual value that remains of that $2,000,000,000 investment that is exemplified by the plants we have. While the cash outlay was in the neighborhood of $2,000,000,000, the cost was not completely $2,000,000,000.

Q. Now, who was selected to take over the work pertaining to the construction of plutonium production facilities?

A. The du Pont Company were contacted by General Groves and Doctor Conant, a member of the office of scientific research and development and the undertaking was of [fol. 13] such magnitude and the results were so uncertain

that the du Pont Company was practically requisitioned to undertake the work.

Q. Did the du Pont Company solicit this work?

A. They did not.

Q. And what have you to say in that respect as to their desires in the matter of undertaking the work?

A. They were not willing to undertake the job until it was demonstrated that the work was of such importance in our prosecution of the war that the du Pont Company could not very well refuse.

Q. And is that actual hesitation on their part expressed in the contract and other documents pertaining to the undertaking?

A. It is. It is specifically stated in one provision of the contract that the only reason that the contractor undertook the work was——(interrupted).

Mr. Rosenberg: If the Court please, I think the contract is going to speak for itself.

Mr. Carlson: I might say that is found in article 35, page 54 of the du Pont contract and I think it is in the fourth whereas in the opening paragraph of the contract if you want to refer to it. I have the original of this instrument here in court and you have a copy of it.

Mr. Rosenberg: Yes.

By Mr. Carlson:

Q. Mr. Vandenbulck, I hand you Plaintiff's exhibit No. 1 for identification, will you just state to the Court what that [fol. 14] purports to be?

A. That is a copy of the preliminary negotiations in connection with the contract for the construction and operation of the Hanford Engineer Works.

Q. And it is dated, or took place on October 31, 1942?

A. That is what the record states here.

Q. And it is signed by whom?

A. Signed by General Groves who was the commanding General of the Manhattan Project and E. B. Yancey, general manager of the explosives department of the du Pont Company.

Mr. Carlson: I now offer this in evidence.

Mr. Rosenberg: No objection.
The Court: It may be admitted.

(Preliminary negotiations in connection with contract No. W-7412 eng-1 admitted in evidence and marked Plaintiff's Exhibit No. 1.)

Mr. Carlson: I think we won't read any of these now to save time and we will cover them in our briefs.
The Court: Yes.

By Mr. Carlson:

Q. Now, just briefly, I know the contract speaks for itself, but just briefly what were the responsibilities assumed by the du Pont Company under the contract?

A. Under the contract they agreed to make every effort to construct the plant and operate it for the production of the product eventually known as plutonium in that they [fol. 15] agreed to throw all their technical skill into the problem, their construction division and engineering divisions participated in it and they eventually built the plant out here and successfully operated it. The contractor right from the beginning indicated that they did not want to operate this plant for a profit and very clearly stipulated in the negotiations and subsequently in the contract there would be no fee, or profit except a token fee of $1.

Q. Why was that put in there, do you know?

A. I don't know, sir.

Q. Did they likewise agree to design and construct a small scale plant at the Clinton Engineering Works in Tennessee?

A. That is right. That was covered in the same contract that is in question here. Subsequently for ease in administration and management of the project, it was excepted and given another number.

Q. Who was to actually operate the Clinton semi-work in Tennessee?

A. Until it was definitely determined that the production facilities would be established at Hanford, it was contemplated that du Pont would operate it. However, after it was relegated to the research center, it was delegated to a research company in Chicago, the University of Chicago.

They operated it until June 30, 1945 and it was then taken over by Monsanto Chemical Company, St. Louis, Missouri, who operated the plant until February 28th, February 29, 1948.

Mr. Green: May it please the Court, we don't know [fol. 16] whether any newspaper reporters are in the room or not. We would like the Court to take into consideration this not be given any publicity at all. These contracts are for the Court's consideration here and much of this information might be desirable to some other nation.

The Court: I think everyone present are witnesses.

By Mr. Carlson:

Q. Now, did the du Pont Company provide men for the University of Chicago for this Clinton Research work and so forth?

A. They did. The nature of the operations at Clinton Engineer Works was such that to a very small degree duplicated the eventual operation of the large plant at Hanford Engineer Works and as a result du Pont technical and operating engineers were made available to the University of Chicago on a loan agreement basis and assigned to the project at Oak Ridge and at Chicago and ultimately when they came to Hanford they were du Pont employees then.

Q. Now, you testified concerning the decision to bring the plutonium plant to some location other than Tennessee. How did they come to select the State of Washington?

A. Why, in every one of these large production plants we were faced with certain basic requirements. We had to have a tremendous available power supply. We have to have a large volume of water. It had to be isolated. Those conditions were not available at Oak Ridge, Tennessee and are available here at the Hanford plant.

[fol. 17] Q. Now, as a practical matter, both the Clinton Plant in Tennessee and Hanford Plant were built together, weren't they?

A. No, sir, well, they were started several months apart. Are you talking about what is now the laboratory plant?

Q. Yes.

A. The laboratory plant was started first and was com-

pleted sometime in '43 and considerable more work had to be done here, for while they may have started together, the laboratory plant outstripped the other one.

Q. When did operations start for the construction of the plant at Hanford, Washington?

A. My best recollection of it is we started the project sometime in February of '43. When I say started the prjoect, that would involve land acquisition and so forth.

Mr. Carlson: I might say, Your Honor, in the stipulation of the facts for each case, these contracts are referred to as attachment A, but I think it would be better for purposes of the record to introduce them as separate exhibits, because they are quite bulky.

Q. Mr. Vandenbulck, I hand you what has been marked Plaintiff's Exhibit No. 2 for identification, will you just state to the Court what that is?

A. That is contract No. W-7412 eng-1, between the Manhattan Engineer District and E. I. du Pont. The contract is for the construction and operation of the Hanford Engineer Works.

Mr. Carlson: Now, I would like to ask Mr. Harris a question here for the record. Does this Exhibit No. 2 contain [fol. 18] substantially all of the contract that existed between the United States Government and the du Pont Company?

Mr. Harris: It contains the portions of the contract which we were able to have declassified for this trial. However, there is nothing in those amendments that affect the issues involved here.

By Mr. Carlson:

Q. Would that be your judgment, Mr. Vandenbulck of what you have seen of the contract?

A. Yes, sir. The amendments that are not covered are covered by some of the projects in the operation.

Mr. Rosenberg: I would like to identify Mr. Harris.

Mr. Harris: My position is assistant general counsel for the Atomic Energy Commission.

Mr. Carlson: You are also a lawyer by profession?

Mr. Harris: That is right.

Mr. Carlson: At this time, I would like to offer in evidence Plaintiff's Exhibit No. 2 as identified by the witness. Any objection?

Mr. Rosenberg: No objection.

The Court: It may be admitted.

(Contract No. W-7412 eng-1 (du Pont) admitted in evidence and marked Plaintiff's Exhibit No. 2.)

[fol. 19] By Mr. Carlson:

Q. Now, how long did the du Pont Company carry on operations, construction work at Hanford pursuant to the terms of this contract, exhibit No. 2?

A. At the time the contract was negotiated, the du Pont Company stipulated that they wanted to get out of that operation just as quickly as possible after active hostilities ceased. Immediately after September, 1945, the du Pont Company requested that it be permitted to get out of the operation at Hanford. The nature of the job is such that it cannot be stopped and required an extensive search by the Manhattan District to develop a new operator that was willing to take on the project. It wasn't until May of 1946 that we were able to reach agreement with the General Electric Company and I believe the General Electric Company took over the active operation in September of '46.

Q. Now, Mr. Vandenbulck, we have referred to construction and operation under this contract. Will you briefly outline to the Court what you have in mind in the use of those terms?

A. In the case of construction under the contract it went a step farther than just the getting together of building materials and whipping them into shape. It actually involved the architecture and design of a lot of the processes, the procurement of the process equipment, the procurement of the necessary building materials and eventual assembly into the building plant. The operation is just as the name implies, the construction of an assembly plant after the construction crews had de-[fol. 20] parted.

Q. Now, was a similar contract entered into between the

United States Government and General Electric Company?

A. It was.

Q. Again, Mr. Vandenbulck, I hand you this document marked Plaintiff's Exhibit No. 3 for identification, will you just state to the Court what that is?

A. That is contract No. W-31-109 eng-52. It is a cost-plus-fixed-fee contract between the General Electric Company and the Manhattan District, War Department.

Mr. Carlson: Now, at this point I will ask Mr. Harris the same question again. Mr. Harris, does this exhibit embody substantially all the terms of the contract between the Manhattan District and the General Electric Company that are material to this cause?

Mr. Harris: Yes, it does. Omitted are amendments 11 to 25 which are still classified. Some of the subject matter relates to technical information which we cannot divulge. If necessary, there are portions which we can by stipulation admit into evidence if they become material in the course of the hearing.

Mr. Carlson: And we will, during the recess, go over the portions that are not in the contract with counsel for the State of the items that are declassified.

Mr. Rosenberg: Would you explain to the Court what you mean by classified and declassified, Mr. Harris?

[fol. 21] Mr. Harris: By the term classified we mean that the document or information contains restricted data within the meaning of the Atomic Energy Act. Restricted data cannot be divulged without the permission of the Atomic Energy Commission and in the Commission we have procedures for declassifying information for public release or for other uses as needed. Of course, there is a large body of information which cannot be divulged, or at least to the public under any circumstances.

Mr. Carlson: With the understanding we will go over these matters Mr. Harris has referred to and give counsel the right to add anything material that is declassified, I now offer this exhibit in evidence.

Mr. Rosenberg: No objection.

The Court: It may be admitted.

(Contract No. W-31-109 eng-52 (General Electric) admitted in evidence and marked Plaintiff's Exhibit No. 3.)

By Mr. Carlson:

Q. Now, how long did the Manhattan District operate under the procedure that you have outlined with the properties and so forth transferred to the Atomic Energy Commission?

A. The Manhattan District officially operated all the properties which are today the Atomic Energy Commission installations from August 16, 1942 until midnight December [fol. 22] 31, 1946 at which time they were transferred pursuant to the terms of an executive order issued by the President of the United States.

Mr. Carlson: Now, counsel, for the record may we stipulate that was executive order 9816 of December 3, 1946, found in 12 Federal register 37, also found in 40 U. S. Code annotated at page 341 of the 1948 cumulative annual pocket part. I think that copy of the order would not have to be introduced, although I think it is on the docket before you. Of course, the 12 Federal is an official publication. I might say, too, for Your Honor's benefit that the act itself is also contained in 40 U. S. Code annotated. Counsel, we can stipulate the order, by reference, is now made a part of the record?

Mr. Rosenberg: That is correct.

By Mr. Carlson:

Q. Now, on the date that that order became effective the Manhattan District was conducting various plants and activities throughout the United States, were they not?

A. They were.

Q. And what happened to those functions, were they radically changed?

A. No, they were maintained and operated in the same manner. Most of the personnel that had been on the civilian payrolls of the Manhattan District were transferred on to the Atomic Energy Commission and remained [fol. 23] in the same position.

Q. You had this Clinton Engineer Works in Tennessee. Was there a plant at Los Alamos, New Mexico?

A. There is.

Q. What is the nature of that operation?

A. That was a laboratory research operation. As has been evidenced in the newspapers, it is the assembly plant of the atomic bomb. It is run under the University of California under a cost-plus contract.

Q. How about the National Argonne Laboratory?

A. The Argonne National Laboratory was not known by that name at that time. It was known as the Chicago University Metallurgical Laboratory. It is only recently it has been known as the Argonne National Laboratory.

Q. And the Monsanto Company was the operating contractor for what company?

A. At the time of the transfer the Manhattan District operated a research plant at Dayton, Ohio, and also the simi-works which are identified with the Hanford operation at Oak Ridge.

Q. Now right there, Mr. Vandenbulck, the main activities of the Manhattan District at that time, time of the transfer pursuant to the order were conducted by contractors, were they not?

A. That is correct.

Q. And the contract operations like du Pont or General Electric constituted, as a matter of fact, the commission's major activities, did they not?

A. Yes. The operating projects were transferred intact. The various contracts for those operations were modified [fol. 24] and the former agency which was identified as the Manhattan District and War Department was changed to reflect the Atomic Energy Commission.

Q. Wasn't that also true at Hanford?

A. Yes, sir.

Q. Those operations, as a matter of fact, represented the great share of the total expenditures of the Manhattan District or Atomic Energy Commission who succeeded to them?

A. That is correct. The Manhattan District had a small civilian staff and conducted all its manufacturing operations by contract.

Q. And as a matter of fact the Atomic Energy Commission really carries out its activities work through contractors?

A. That is correct.

Q. Now, I believe you touched upon the subject of Hanford eventually becoming a separate unit?

A. That was purely an organizational separation. Under the Manhattan District operation the headquarters for the entire operation was at Oak Ridge with a number of areas established to carry on the actual work. At the time the Commission took over, or shortly thereafter, it was deemed it would be unwieldy to operate the entire field organization from the headquarters in Washington, as a result of which the present regional operation was developed which are in operation; five geographic regions that take care of all field operations.

Q. You have been rather familiar with a great number of government contracts during your experience as recited, have you not?

[fol. 25] A. Yes, sir.

Q. Now, Mr. Vandenbulck, in the preparation and agreeing upon the du Pont contract, there were some rather unusual features, were there not?

A. There were. First of all the contract, or the contractor did not guarantee he would ever produce anything out of these plants that he had been asked to design and construct. He also insisted upon a number of safeguarding provisions that would completely permit him to not be involved in any financial liability. The nature and hazards of the work was such that possibility of financial liability were enormous and that was evidenced in some of our attempts to purchase public liability insurance which is a normal requirement in any operation.

Q. Before we get into that, could du Pont Company, for example, select whatever personnel they wanted in every respect under the contract?

A. It had to be agreed to by the government from the nature of security standpoint. First individuals had to be investigated by the Military Intelligence who were supreme in those investigations and had to be given clearance on the basis of their established loyalty.

Q. Now, you have reference, I think, to the rather unusual "hold harmless" provision in the contract. I appreciate those are set forth explicitly in the contract, but what features did you have in mind, for example with the du Pont contract, I think it is article 32 page 49?

A. At the time the definitive contract was being worked out the question of the War Department's authority, or Manhattan District's authority to write such a completely [fol. 26] hold harmless clause came up for considerable discussion. It culminated in getting that particular feature of the contract manually initialed by President Roosevelt and subsequently submitting that same contract provision to the General Accounting Office for a prior review and decision as to whether there would be any objection on their part to the inclusion of such a provision in the contract.

Q. In substance the provision finally resolves itself into the payment of all claims, liability of every kind and nature by the United States government?

A. Its purpose is to hold the company completely harmless and make them completely whole in connection with the operation.

Q. And article 18, sub-paragraph 9, which is found in the du Pont contract on page 39A, was that an unusual provision in government contracts?

A. It is. That is an unusual provision which also was submitted to the Comptroller General for his review and approval for the United States.

Q. Now, the contract also sets up an employee's benefit fund in article 33 at page 50. Was that a usual provision?

A. No, sir. That was just peculiar to the operation of the Manhattan project. The nature of the undertakings were such, the hazards were such that it was quite often necessary to offer added inducements to people to work on the project. Medical experience was such they cannot forecast what might happen as result of exposure to excessive radiation. The dosage a human could stand was not fully developed and also some safeguards had to be [fol. 27] taken in order to insure the employees would not be unnecessarily harmed, financially or otherwise as a result of working on the project.

Q. Under that provision did the government establish an employee's benefit fund in the amount of $5,000,000?

A. They did.

Q. Had you ever heard of that before this contract?

A. No, sir.

Q. Was that actually established?

A. It was actually established in case of the du Pont contract and also the General Electric contract at the time of the take over.

Q. Isn't it true, in fact, that the United States government pays all benefits under that provision?

A. Yes. The source of any payment under that provision of the contract is funds provided by the government in the first instance. In the event the sum is inadequate, additional sums are to be provided.

Q. And isn't it true, Mr. Vandenbulck, that the benefit provided by article 33 of the du Pont and similar provision in the General Electric contract are in addition to benefits provided by the Workman's Compensation Act?

A. That is correct. I think the contract so states.

Q. Now, does this paragraph on benefits embrace employees of sub-contractors as well as employees of the direct contractor?

A. It embraces all employees of the principal contractor or sub-contractor who are injured as a result of exposure to the hazards.

[fol. 28] Q. Is that also an unusual provision?

A. There is no criterion that I know of.

Q. Referring to article 32 of the contract, page 49, being "Responsibility of Contractor-Contingencies", what is the nature of that provision, what is it intended to cover?

A. It was again intended by that paragraph to indicate the unusual nature of the job, the fact that the War Department requested the company to undertake the construction and operation of the project and a re-statement of the fact that the government undertook to assume complete responsibility for anything that might arise out of the operation of the work.

Q. Now, generally, who owns all of the property located within the State of Washington at the Hanford project, where is the title to it?

A. All the property concerned in the operation of the project at Hanford is owned by the government.

Q. And is that generally true throughout the United States?

A. In the operations of the commission, or Manhattan District, yes.

Q. Now, there we want to call your attention to amendment 3, page 3 in the General Electric contract. Generally, Mr. Vandenbulck, when did the title to materials as purchased by either du Pont or General Electric pass to the government?

A. I think that is a legal determination. It is set forth in the contract as to when that transfer takes place.

Q. Now, what was the actual compensation to the du Pont Company for their entire services under this contract?

[fol. 29] A. They were given a fixed fee of $1 in addition to which they were reimbursed all of the expenditures they incurred in connection with the construction and operation of the plant.

Q. And the article of the contract that covers that is article 11 on page 13, "estimated cost and fixed fee"?

A. I expect that is it.

Q. And article 13 of page 22 of the contract. Now, you mentioned overhead on the part of the du Pont Company, how was that taken care of in the contract? Just state generally.

A. It was realized in connection with an undertaking as large as this it would be impossible to handle as direct costs the various organizations, the departments and divisions of the du Pont Company, that would participate in this, especially if the participation was on a part time basis. In addition to that there would be the need to be reimbursed to the contractor for space and facilities used in Wilmington and at other regularly established installations. It was realized that it is proper to appropriate a share of that cost to this work and in order to facilitate such charges, a monthly overhead was agreed to by the parties. Recognizing the difficulty of making a just allocation to the parties, it was agreed that overhead allowance would be accumulated and at the end of the contract

period the company would make a review of its expenses under our contract and then allocate its normal overhead expense in accordance with its regular accounting practices; would have that reviewed by public accountants that [fol. 30] were acceptable to the Manhattan District or commission. The accountants in their review would make certain as to the reasonableness of such an allocation. If that statement developed there was excess of overhead paid, then by the terms of the contract it was to be returned to the government. If it developed there was insufficient overhead paid, then by the terms of the contract I believe the company can make claim for the additional amount.

Q. Was du Pont, as a matter of fact, to obtain any profit for their work under this contract basically?

A. No, sir. The company, at the start of the negotiations, clearly stated they would not undertake this work for a profit.

Q. As far as you know has that been applied?

A. To the best of my knowledge that has been the situation all the way through.

Q. Now, would your answers with regard to compensation be the same insofar as the General Electric contract is concerned, being exhibit, Plaintiff's exhibit No. 3?

A. The conditions with regard to no profit angle, yes, are identical. The du Pont existing contract served as a model in connection with the negotiations of the General Electric contract.

Q. Are the two contracts essentially the same?

A. In those respects they are, yes.

Q. Now, what consideration was actually paid to General Electric Company, or will be paid under its contract?

A. There is a provision for the payment of a $1 fee and an overhead allowance which is governed by the same essential requirements as I indicated before applied to [fol. 31] the du Pont overhead allowance.

Q. And is it true to state that it was the express intention of the parties in the contract and in practical application that there be no profit to the General Electric Company?

A. That is true.

Q. And as far as you know has that been applied up to the present time?

A. To the best of my knowledge that situation holds true.

Q. Now, with respect to the employment of labor, let's take the du Pont Company first, although the contract contains provisions relating which are found in article 31 at page 41, generally how was labor employed by the du Pont Company at the project? Let's take the manual labor first, what do you mean by manual?

A. Manual labor is defined as people who work with their hands or with tools and are craftsmen or laborers. Mechanics are manual laborers. Those were recruited by the du Pont Company to the best of their ability, using all sources, they maintained a series of recruiting offices around the country which they, every person that had the necessary qualifications, then shipped them on to the project. However, that didn't mean they remained there. They had to fill out the necessary security personnel forms after which they were investigated and if the individual proved to be in the opinion of the Intelligence Division as unsatisfactory, or could not be trusted with the nature of the work he was to perform, the individual was discharged at the request of the Manhattan District, or commission.

[fol. 32] Q. Generally how were these manual employees paid, who paid them?

A. They were paid by the du Pont Company, or by General Electric from funds advanced, made available to them by the government.

Mr. Carlson: I will come to the advancement of funds, Your Honor.

Q. Now, how about non-manual employees, how were they hired and paid?

A. They were recruited, or taken from the contractor's home organization and transferred to the project, subject to the same security clearance the other employees were. They were paid, after they were approved, by the du Pont Company from funds originating at the same source.

Q. Non-manual employees are defined——

A. Supervisory employees other than mechanics or laborers.

Q. Now, were the salaries and wages of every employee on the job at Hanford subject to government control and supervision?

A. They were.

Q. Do you know about how many employees they had at Hanford?

A. During what period, sir?

Q. During construction for example—I have Mr. Church here.

A. I would have to guess, but somewhere in the neighborhood of 30,000 or 40,000.

Q. Now, I believe you stated, I didn't hear your answer, that the salary or wages of every employee on the job at Hanford was subject to government control and supervision?

[fol. 33] A. That is correct.

Q. If the government didn't want a man there for security reasons, or otherwise, did they have the ultimate right to tell the contractor to retain or discharge them?

A. That is right. The contracting officer could require the discharge or separation of any individual whose continuance on the project was inimical to the best interest of the government.

Q. Did this later follow after General Electric took over?

A. Yes, sir.

Q. Does it obtain today?

A. It obtains today.

Q. Now, the contract in article 37, sub-paragraph (h) which is on page 34 provides that the contracting officer can order a reduction of personnel deemed excessive, is that true?

A. That is true if in the opinion of the contracting officer the contractor has too large a force, he can request that it be reduced, or direct it be reduced.

Q. What do you mean by contracting officer?

A. The term, I think, is properly defined in the contract, but under government procedure in order to sign a contract the individual that signs for the government must be duly vested with authority to commit the government

to such an undertaking and he is always designated as a contracting officer. He is permitted to designate representatives and delegate some of his authority for the administration of the contract to others in his organization, but he is the only one that can actually sign the document.

Q. Did the army maintain an officer and force at the project?

[fol. 34] A. Yes, there was a contracting officer at the project with certain limits of monetary authority.

Q. Now, were the employees at Hanford during construction and operation as long as the law obtained subject to the provisions of the National Labor Relations Act?

A. They were.

Q. And how were their rates of pay determined?

A. In the case of construction workers the rates were established as required under the Davis-Bacon act which provides that the Secretary of Labor, or charges the Secretary of Labor of the Federal Government with establishing the rates for all construction crafts on a construction project. During the war years by the terms of an executive order issued by President Roosevelt not only was that rate the minimum to be paid, but also made the maximum rate to be paid.

Q. Now, Mr. Vandenbuick, how were public liability claims taken care of at the project in Washington?

A. Public liability claims were taken care of by an insurance policy which was negotiated between the du Pont Company and the Travelers Insurance Company of Hartford, Connecticut. The policy is unique in that we did not pay a premium for coverage provided. The amount of public liability coverage that du Pont Company insisted on having was so large that no company in the United States could underwrite it without re-insuring the major portion of it. The nature of the coverage to be provided would not permit re-insuring. Therefore we could not buy the normal coverage. In this particular case it was necessary that the government post a $10,000,000 collateral fund to take [fol. 35] care of the public liability that might be incurred in connection with the operation of the project. The insurance company in effect operates under an insurance agreement whereby they are paid a flat sum annually for the

availability of their organization plus various services they render in connection with the coverage under the plan.

Q. Now, that contractural relationship between the insurance company is between whom?

A. Du Pont.

Q. And who pays the premiums on that insurance?

A. There are no regularly assessed premiums.

Q. I mean the cost of it I should say.

A. The cost is paid by du Pont from these funds which I indicated before were advanced for the project.

Q. Who put up the advancement for it?

A. By the government.

The Court: At this time we will recess until one-thirty.

(Whereupon a recess was taken until one-thirty o'clock P.M. At this time the following proceedings were had and testimony taken, to-wit:)

By Mr. Carlson:

Q. Mr. Vandenbulck, when we adjourned I think we had disposed of how public liability claims of the contractor and the operator were handled. Now, with relation to Workmen's Compensation for the protection of construction and operating employees at Hanford, will you outline [fol. 36] to the Court how that matter was handled?

A. In March 1943 a Mr. Claw who was the chief compensation counsel and I came to Olympia and met with Mr. Robert Harlan who was then the Director of the Department of Labor and Industries and handled compensation insurance in the State of Washington. It was necessary we work out an agreement with the State, because the nature of the State's statutes with regard to compensation permitted only coverage in the State fund. At that time it was the practice to assign an industry to a specific class which would then contain it in a group of similar industries throughout the State and they paid the same rate per man hour on the project. We felt we could not be classed in any one of those groups; the normal services of the State could not be taken advantage of, due to the nature of the job and secondly our industry as outlined in other states. Mr. Harlan under special authority given

him by the legislature in 1943 was authorized to make special arrangements for the purpose of the prosecution of the war. Under the authority given him by that particular act, he made arrangements with the Manhattan district and du Pont which resulted in an agreement signed by all three parties. Under this agreement the rights of workmen as far as compensation statutes of the State were concerned were fully protected, however, the normal methods of supplying funds for the payment of those funds was changed in that it was worked on a strictly cost basis. The agreement provided for the establishment of a $25,000 fund for the——(interrupted).

Mr. Rosenberg: Do you intend to put a copy of that [fol. 37] agreement in the record?

Mr. Carlson: I hadn't intended to. I don't know whether that has been decalssified or not.

Q. Is it, Mr. Vandenbulck?

A. I don't believe it has, but by the nature of it I think it can be if you desire to introduce it in the record.

Mr. Carlson: I have a copy of it in my safe which I can give to you.

Mr. Rosenberg: If it was available—I don't know it makes a lot of difference.

The Court: I might suggest that while the usual rules of evidence are that documents themselves are the best evidence, that in this case the documents being introduced are so extremely voluminous it will be of service to the Court to have the witnesses give some idea of what the nature of the documents are and what the pertinent portions are. That information will be of great service to the Court in this matter.

A. I believe I had indicated that the du Pont Company from the funds advanced by the Manhattan District established a $25,000 fund to take care of current claims and also established a $10,000 medical and hospital fund. If, as a result of an injury a claim arose which was in the nature of a pension, the amount of that pension was determined on the best available data that the Department of Labor and Industry could furnish and a pension reserve was established. The amount of that was billed to the

du Pont Company and again the funds were put up and [fol. 38] made available to the State for their monthly or semi-monthly payments to the claimant. The agreement also provided that at the termination of the war, or the contract operation, that all the liabilities that had been incurred or that might be incurred as a result of that operation were to be transferred and assigned to the United States and I think such an assignment was actually prepared. I can't testify for certain as to that, but such an assignment was set, was provided for in the contract document which was a three party agreement.

By Mr. Carlson:

Q. Now, whose money was actually put up in that fund?

A. It was the government funds that had been provided to du Pont to carry on the work.

Q. Now, when the du Pont Company stepped out of the contract and General Electric took over under the new contract, did the du Pont Company insist on being released insofar as any workman's claims were concerned and the government be required to take on that obligation?

A. It did, insofar as any claims that might be attributed to that period after it ceased the operation of the project.

Q. And as a practical effect, has the procedure which you outlined been actually followed and carried through?

A. The procedure as outlined has been carried, followed through by du Pont and is now in effect by General Electric Company.

Q. In effect, the government is its own insurer for claims to these workmen?

Mr. Rosenberg: If the Court please, I think the record [fol. 39] will show this is a conclusion.

Mr. Carlson: I will withdraw the question.

The Court: Are you withdrawing the question?

Mr. Carlson: Yes, Your Honor.

Q. Now, what was done for du Pont employees and General Electric employees engaged in the project with reference to a deduction for Federal Old Age benefits?

A. The normal requirements of the law with regard to FOAB were followed. The employees' contribution and

employer's contribution were both turned over to the proper agency of the government. However, the employer's contribution were provided from the funds made available to the du Pont Company by the government.

Q. What was done with respect to employees insofar as unemployment insurance deductions were concerned?

A. The Washington State requirements were met, whatever they were, and the normal employer's contribution was paid to the State fund from the funds made available to du Pont as the operator.

Q. Now, would the testimony which you have just given be equally applicable to construction employees and operating employees?

A. It would.

Q. And would the testimony be applicable to employees under the General Electric contract and du Pont contract?

A. It would.

Q. There was no distinction?

A. No distinction.

Q. Now, with reference to the safety requirements, do the contracts provide that the government, or Manhattan [fol. 40] District would have anything to say in that particular?

A. They do. The safety requirements of the corps of Engineers with regard to construction of plants were, I believe, referred to in the contract document itself. The operating requirements with regard to safety were worked out jointly between the operator and the Manhattan District, because of the lack of any knowledge of what might be encountered in the operation.

Q. And was the contractor in both instances required to comply with the directives and orders of the Manhattan District in that particular?

A. Yes, they were.

Q. Now, the government exercised a large number of controls both for du Pont and General Electric and still do, do they not?

A. Yes.

Mr. Carlson: I might say on that, counsel, I am going to put on another witness. I just wanted that brief statement both as to du Pont and General Electric.

Q. Now, there is one question I neglected to ask you about rates for manual labor. Were they in effect prescribed by the Secretary of Labor of the United States for the du Pont construction employees and the operating personnel?

A. The Secretary of Labor is charged with the responsibility of prescribing rates in connection with construction work. The Walsh-Healy act provisions are applicable to the operation and provided the Secretary of Labor has made a finding, then the wage provisions of that act are [fol. 41] made applicable. However, the rates for operating personnel were developed between the Manhattan District and du Pont as result of efforts to staff the operation. Those rates, after being agreed to, were reflected in the schedule and approval given by the Manhattan District. That approval, however, stemmed from a prior approval by the stabilization board.

Q. What was the procedure insofar as the General Electric contract was concerned?

A. I am not certain whether the stabilization board was in effect at the time the General Electric contract was negotiated, but if it had been, that same procedure would be followed. The Manhattan District and Atomic Energy Commission continued to exercise restraint over the wage rates and the final approval by the Manhattan project or Atomic Energy Commission.

Q. Now, I think at this point we ought to go back to this advance fund or revolving fund that you have mentioned in your testimony. Will you just explain to the Court how that was set up and how it was actually used in fact, by the du Pont Company and the General Electric Company under these contracts?

A. The nature of the work was such that it involved a tremendous outlay of cash to run, currently run the job. Because of the no profit angle in the contract, it was necessary that the government provide these funds since the contractor had no way of recouping the interest charges. The government established a special fund, or the contractor established a special fund in a bank that was clearly identified with the contract and could be [fol. 42] utilized only in connection in carrying on the

work under the contract. This fund came about as a result of an estimate by the contractor of his expenditures over a period of two or three months. A check was drawn; that check was deposited in the special account. Thereafter it was used by the contractor to finance the operation. At the end of a given period the contractor prepared a request for reimbursement which in effect did nothing more than to reestablish the revolving fund so he had a current supply of cash to finance the operation and was never required to utilize his own funds.

Q. And the provisions relating to that advance or revolving fund are found in article 14 of the du Pont contract at page 25 and article 15 of General Electric contract at page 27?

A. I would have to see the contract to make that statement.

Q. I thought it might be well to get it there for the Court's information. Now, are those advance revolving fund arrangements essentially the same for the du Pont Company and the General Electric Company under the two contracts here involved?

A. They are.

Q. Now, did the government generally exercise any control or dominion over those accounts?

A. I believe the contract will clearly indicate government authority with regard to those accounts. That is, the government, by letter, can instruct a bank to freeze those funds at any time and allow no further withdrawals or payments to be registered against it.

Mr. Carlson: I think in that connection, Your Honor, the [fol. 43] contract is rather long and probably is the best evidence and unless counsel has some particular questions in mind for that, I won't develop it any further at this time.

Q. Now, I want to get to the subject of purchases by the du Pont Company under the terms of the contract. What was its power in that particular? Will you just go through the procedure that was followed generally? I am going to supplement your testimony with the documentary forms that were used, but I wish you would outline to the Court the general procedure in that particular?

A. After the contractor had designed a portion of the plant to be constructed the material take-over men in the contractor's organization would take over a bill of materials from the project approved plans. They would then solicit quotations from various sources and after they had received quotations would analyze them and make recommendations as to the award of the purchase. That award would be submitted to the contracting officer, or his authorized representative with a form known as a record of purchase. That record of purchase was examined by the contracting officer's staff and if all the conditions that are precedent to its approval were met, he would indicate his approval thereon and return that form to the contractor. The contractor on that approval would make a commitment to the vendor to go ahead with the provision of the material. Subsequent to that, or perhaps the same day, a purchase order, clearly setting up the contractural agreement, was then submitted to the contracting officer for his approval.

[fol. 44] Q. The contracting officer means who?

A. The individual that signed the contract on behalf of the Government, or his duly authorized representative.

Q. Then how would the material that was purchased under that procedure be actually paid for?

A. Oh, in due course when the material was delivered, or the invoice was received, it would be processed through the construction store's account. Prior to the processing of the invoice, if the material had been received at the local project, it would have been checked by a contractor's receiving and inspecting clerk. It would also be spot checked, or test checked by a representative of the Manhattan Engineer District. The evidence of that inspection would be reflected on receiving an inspection report after which the contractor paid the bill to the vendor. The invoice together with that inspection report was then submitted to the contracting officer for reimbursement, to replenish the revolving fund.

Q. Was that done periodically?

A. I believe the contract says weekly, or more often as the need becomes evident.

Q. Are you familiar with the provision that pertains in two contracts with reference to purchases over a designated amount?

A. That approval is only necessary when the procurement, or purchase exceeds $2,000 in value.

Q. That was true with reference to the du Pont contract and the General Electric contract?

A. The General Electric contract was slightly different in that it states $5,000 as the amount at which the [fol. 45] contracting officer's approval is required unless it is in connection with the construction work, in which case the amount becomes $2,000.

Q. Mr. Vandenbulck, what was the situation concerning the building of roads in the project area, how were they built?

A. All roads necessary for the prosecution of the work were built by the contractor.

Q. And by whom are they maintained?

A. They are maintained by the contractor, all at the government's expense.

Q. That was true with other municipal activities at the town of Richland?

A. That is true with regard to all the municipal activities. That includes schools and police and fire protection and any other municipal things like sewage and lighting and so forth.

Q. Now, are there any property—do you know whether or not the State makes some contribution to the operation of the schools at the town of Richland?

Mr. Rosenberg: Just a minute, I would like to object to that question. I can't see it has any materiality to the contract.

The Court: I don't see the materiality of it either.

Mr. Carlson: We don't desire to press the question if counsel doesn't want it in the record.

Q. Now, does, are there any property taxes paid upon the land within the area of the project?

A. There are no taxes paid on the real estate that comprises the Hanford Engineer Works.

[fol. 46] Q. Would that be true of the property and land

within the town of Richland which is likewise within that area?

A. That is true if it is owned by the government.

Mr. Carlson: I would like to offer in evidence Plaintiff's Exhibit, marked for identification, No. 4, which is the public proclamation No. 26, November 12, 1946.

Q. Generally, what is that, Mr. Vandenbulck?

A. This is what is generally referred to as a military exclusion order. It establishes a certain area under which the exclusive jurisdiction as to who may enter into that area and under what conditions they may enter into it was vested in the District Engineer of the Manhattan District.

Mr. Carlson: I would like to offer that in evidence.

The Court: It may be admitted.

(Proclamation No. 26 admitted in evidence and marked Plaintiff's Exhibit No. 4.)

Mr. Carlson: Your Honor please, Plaintiff's Exhibit No. 5 for identification is a copy of the executive order 9925 establishing air space reservations over certain facilities of the United States Atomic Energy Commission. This order is found in the Federal register as shown on the exhibit, volume 13, No. 13, dated January 20, 1948, page 251.

Q. Are you familiar with that order, Mr. Vandenbulck?

A. Not with this particular one. I know such orders [fol. 47] were issued, because we have them in effect for the area that comprises Oak Ridge.

Mr. Rosenberg: We don't have any objection that it purports to be a copy of the executive order from the Federal Register and as a copy of that official record we have no objection.

Mr. Carlson: I offer it in evidence.

The Court: It may be admitted.

(Executive Order No. 9925 admitted in evidence and marked Plaintiff's Exhibit No. 5.)

By Mr. Carlson:

Q. Now, Mr. Vandenbulck, in the performance of the contract, did du Pont spend, or was it expected to spend any of its own funds?

A. It was not expected to spend any of its own funds in doing the work under this contract and to the best of my knowledge they did not spend any of them.

Q. Would that be true for construction and operation?

A. That was true for both phases.

Q. And what would your answer be to the same question insofar as the General Electric contract is concerned?

A. That same condition obtains in the General Electric contract.

Q. Now, with reference to sub-contracts, can either company, either du Pont—I will withdraw that. Were either one, or are either one of these companies permitted to sub-contract any work under the contracts that you have covered without the Approval of the Atomic Energy [fol. 48] Commission or the government, as the case may be?

A. They are not.

Mr. Carlson: I think we have asked this witness all our questions on direct, but I would like the right to ask a few more if it occurs to me in redirect. These witnesses have come from long distances and we haven't had too much time together.

Cross examination.

By Mr. Rosenberg:

Q. Mr. Vandenbulck, I want to ask you first about the type of expense involved in this provision for overhead reimbursement. First with respect to the du Pont contract in article XII on page 18 and then in the General Electric, it is on page 27 of the mimeographed sheets in the exhibit. What was the type of expense involved there, things like the president's salary of the du Pont corporation?

A. The incorporation officers of the du Pont corporation have to be paid and the company practice is to establish those salaries, or pay those salaries and charge them to

an overhead account. To the best of my knowledge they take this account and distribute it over all the work they do, allocating a certain portion of it to each job. In addition to those salaries and expense of maintaining their office. The Manhattan project occupied space in the du Pont home office at Wilmington, Delaware. This space was provided without charge. The space occupied by the engineer's personnel and procurement personnel [fol. 49] stationed in the east and all the different departments were all charged against this overhead allotment.

Q. Would you say a portion of the salary of the president of the du Pont corporation was involved and absorbed in this overhead?

A. It may very well be.

Q. And the same would go to other incorporation officers?

A. That is correct.

Q. Is there any question in your mind about that?

A. I am not familiar with the detail what du Pont has charged to the overhead allowance since the contract is not complete and it can't be reviewed by us until it is complete and du Pont makes the presentation to us.

Q. Under the provisions of that contract du Pont Company received $17,500 a month for overhead reimbursement from October, '42 to March, 1943, did it?

A. That is probably true, sir.

Q. And the amount from March, from April '43 to the completion of the construction work, it received $271,842 per month?

A. If the contract so provides, it undoubtedly was paid those amounts.

Q. And after the completion of the construction work until the termination it received $127,632 per month?

A. There was a reduction in the overhead allowance in connection with the operation.

Q. Now, the same thing would be true in the General Electric contract, would it not, the executive salaries would be, to some extent, absorbed in that overhead amount?

[fol. 50] A. That is correct. The allocation of the normal overhead of the company would be assigned to this job in

whatever proportions in the judgment of General Electric were proper.

Q. Now, the allocation of these salaries is the type of expense that is intended to be covered by these provisions?

A. That and numerous other intangible things.

Q. And in the General Electric contract $200,000 per month from July 1, 1946 to the completion of the contract?

A. That is right.

Q. In the course of your testimony you talked about an insurance policy with the Travelers Insurance Company at Hartford, Connecticut. That was a contract between du Pont Company and the insurance company, was it not?

A. That is correct. It is a public liability policy and property damage policy that was necessary in order to protect the public in connection with these operations.

Q. The contracting parties are du Pont and Travelers, are they not?

A. That is correct.

Q. Now, during the life of these contracts which you talked about, there were numerous contractors employees, were there not?

A. Yes.

Q. There were also Manhattan District employees, were there not?

A. There were Manhattan District employees assigned to Hanford.

Q. And there were also later Atomic Energy Commission employees?

[fol. 51] A. Yes.

Q. There is no confusion, is there, between Atomic Energy Commission employees and contractor's employees and Manhattan District employees as to source of payment of wages?

A. No.

Q. Take the Manhattan District, your Manhattan District employees got paid by government check?

A. Correct.

Q. And your du Pont employees were paid by du Pont check?

A. Correct.

Q. There was never any workmen's compensation deduc-

tion with respect to the salary of an employee of the Manhattan District?

A. No. The Federal employees are covered by the Federal Compensation Act.

Q. And the same is true of the Atomic Energy Commission employees?

A. That is correct.

Q. You did not have any of these contractor's employees as Federal employees?

A. No.

Q. And the same is true with respect to your unemployment compensation and social security and old age benefit funds?

A. That is correct. There is no unemployment compensation for Federal employees.

Q. Now, in testifying with regard to this workmen's compensation contract, you mentioned that it was money of the United States that was used?

[fol. 52] A. I said it was money of the United States that was furnished to du Pont for the operation of the project.

Q. Du Pont used this sum to take care of its obligations incurred in the contract, did it not, in the operation of the contract?

A. That is right.

Q. And it used this fund to enter into the workmen's compensation agreement in the same way it bought pencils, did it not?

A. It used the funds the government made available to it under the revolving fund arrangements to set up the required deposits that came out of this three party agreement with the State, du Pont and the Manhattan project.

Q. The State received its money from du Pont by du Pont check, did not not?

A. Right.

Mr. Rosenberg: Now, if counsel have no disagreement I have here a printed opinion of the Attorney General dealing with this fund and referring to the act which established it and the authority for it and to make this record comprehensive, and it is very short, and I would like to read it into the record.

Mr. Green: We would like to look at it.

Mr. Carlson: If the Court please, we have no objection to it insofar as its being an official opinion of the Attorney General, however, we do not know there are no inaccuracies in the facts as given by the writer of the opinion and we [fol. 53] don't want to be bound by any statement made by the author of the opinion. With that understanding we have no objection to it. The particular inaccuracy that stands out is the statement in there on page 284 that du Pont proposed the plan. We don't think that is accurate and the witness has testified contrary to it.

Mr. Rosenberg: If the Court please, we realize Plaintiff will not be bound by this as statement of fact. However, this is an official record of the State of Washington and we merely wish it be in the record for those who are required to examine it.

Mr. Carlson: On that basis we don't object to it.

The Court: You may proceed.

Mr. Rosenberg: This appears in the bound opinions of the Attorney General for the years 1943-1944 at page 283, dated October 9, 1944, addressed to the Prosecuting Attorney of Franklin County.

"Dear Sir:

We have your telephone communication in regard to individuals who are injured on the Hanford Project, and beg to advise you as follows:

The legislature of the State of Washington, by chapter 85, Laws of 1943 (7796-25, Rem. Supp. 1943), effective March 15, 1943, provided for the approval by the State Department of Labor and Industries of a war project insurance rating plan providing for compensation with respect to cost-plus-fixed-fee projects involved in the [fol. 54] prosecution of the war and engaged in the performance of the work, either directly or indirectly, for the United States.

E. I. duPont de Nemours and company entered into a contract with the United States of America for the completion of what is commonly called "The Hanford Project"

which contract was approved and carried the consent of the United States army by its proper officer.

E. I. duPont de Nemours and company proposed a plan which was approved under chapter 85, laws of 1943, and that plan was approved by the proper official of the United States army. The plan being approved by the United States army carried with it, in our opinion, the inference that the plan "will effectively aid the prosecution of the war," and that is the only standard set up in chapter 85, laws of 1943. Consequently, the approval of said plan after the same was approved by the army of the United States and its proper official, was proper on the part of the department of Labor and Industries of the State of Washington.

Hanford workers are, therefore, under the Workmen's Compensation Act of the State of Washington and are guaranteed all the rights under the said Workmen's Compensation Act. They are thus under the plan submitted and approved by the army of the United States.

We therefore advise you that where a workman is injured on the Hanford Project, he has his remedy under the contract approved by the army for the Hanford Project, under sections 7673 to 7726, rem. rev. stat.

Smith Troy, Attorney General."

Mr. Carlson: It will be noted in the last paragraph the army proposes the agreement and in the previous paragraph the du Pont Company proposed it. That is the objection I had in mind. I think the last paragraph is [fol. 55] extremely accurate.

Mr. Rosenberg: If the Court please, if I may be permitted to comment on that. This opinion, as must be evident to the Court, treats with a subject like much of the negotiations as surrounded this contract, was cloaked in the utmost secrecy and until both sides of the negotiations could be laid before the Court, extremely indefinite conclusions would result and we have here only the comment of counsel as to what happened.

Mr. Carlson: There is no showing in the opinion that a copy of the contract was before the writer of the opinion.

Mr. Rosenberg: As Defendant's Exhibit 6, Your Honor,

we offer in evidence three letters by the Secretary of War to the Governor of the State of Washington under dates of May 26, 1943, November 8, 1943 and January 4, 1944. These letters are two photostatic copies and one carbon copy of the originals and I believe counsel will stipulate with me they are accurate copies of the letters as written and that they may be received in evidence.

Mr. Carlson: It is so stipulated.

The Court: They may be admitted.

(War Department letters above referred to admitted in evidence and marked Defendant's Exhibit No. 6).

[fol. 56] Mr. Carlson: I think it may appear later, when all the testimony is in, that some of these documents are not material. I think that both parties should have the right to reserve their objection to the exhibits being material when all the testimony is in. We have no objection to the form, but we do want to reserve the right to object to the materiality when the proper time comes.

The Court: That seems entirely proper, because of the nature of this matter, some of the witnesses coming from great distances, there is some variancies in the ordinary of proof and I think that is entirely proper.

By Mr. Rosenberg:

Q. Mr. Vandenbulck, I hand you Defendant's Exhibit 6 and ask you if you are familiar with those letters and the subject matter concerned therein?

A. Just by hearsay. Prior to your giving me these copies I had heard of this correspondence being exchanged, but I had never seen it.

Q. Well, when you testified with reference to this area having been established as a military exclusion area, you used in your testimony exclusive jurisdiction, you didn't have reference to this type of jurisdiction, did you?

A. No, sir. I think if you will go back to the testimony, I stated that the control, the exclusive control as to who had access to the area and under what conditions they [fol. 57] were admitted to the area was exercised by the district engineer.

Q. When you testified with respect to the liability of property in the area for taxes, you were aware that in order to achieve that liability, it would be necessary for title to be in the United States Government, were you not?

A. That is correct and title to all the lands vested in the United States Government. That is, those lands which they acquired in fee. In addition to that, there was large acreage that was leased. They did not pay any taxes on it.

Q. You were aware then during that time that during all of this time that the State of Washington retained jurisdiction over the area?

A. Yes, sir.

Q. Now, you testified to your familiarity with cost-plus-fixed-fee contracts in general during the work, did you not?

A. Yes.

Q. Then you testified with some particularity about the purchase provisions in this particular contract. Weren't those procedures for this contract substantially the same as those required on every other cost-plus-fixed-fee contract?

A. With regard to the contracts I know about, essentially they were the same.

Q. Do you know from your familiarity with these contracts and the procedure under them what percentage of say first du Pont's own materials were purchased by the [fol. 58] du Pont Company?

A. That is very difficult. I don't know, but I think it was very definitely in the minority, because du Pont did not want to be maneuvered into the position it was building this project with products manufactured in its own industry.

Q. Would the same be true to General Electric?

A. That is correct. Insofar as General Electric is concerned, it actually took special approval by the contracting officer to permit the incorporation of its products into the plant.

Q. Has it ever been done?

A. I believe it has been done in the past.

Q. Under both contracts?

A. I can't say definitely whether it was true under

du Pont. It may have been. The contract does not prohibit such a procedure.

Q. Another thing I wanted to ask you about, with reference to other contracts in comparison with this contract, weren't there such controls with respect to most wartime contracts on other cost-plus-fixed-fee contracts such as the right to screen employees and so on?

A. Not necessarily. It depended on the nature of the project. I am certain, I know for a fact I was assigned to the construction of the Rome air base in Rome, New York, in May of 1941 and at that time we had no such screening procedure as was instituted in this operation.

Q. That was previous to Pearl Harbor?

A. That is right, but it continued right on through Pearl Harbor.

[fol. 59] Q. But, there were other contracts that have this provision in it?

A. From the standpoint of investigation by military intelligence, I don't know of any. There may be others.

Q. In this instance they had authority to exclude people from private property in a number of wartime contracts?

A. That is true.

Mr. Rosenberg: I think that is all, Mr. Vandenbulck.

Redirect examination.

By Mr. Carlson:

Q. Mr. Vandenbulck, are you able to state how high an amount the advance fund would run from time to time that were advanced to du Pont during the construction of the project?

A. Because the definitive contract took almost a year to work out, it was necessary that the advances on this project—well, let me change that. The advances made by the Manhattan District for the du Pont Company for the Hanford job went far beyond anything that was normal. I think at the maximum it reached $133,000,000 at one stage of the game.

Q. Now, at the present time at Hanford you have the employees and representatives of the Atomic Energy Commission, do you not?

A. Yes.

Q. And the employees of the General Electric Company, or United States Government under the contract?

A. Yes, they are stationed there.

[fol. 60-64] Q. Is there quite an intertwining of the various matters that necessarily are handled in the project between those two people?

A. I can't state definitely that is so, not having been connected too closely with the Hanford project since General Electric took it over. But, by the very nature of the operation, a very close relationship must exist. The operation of the contract comes under the general direction and supervision of the Atomic Energy Commission.

Mr. Carlson: That is all.

Mr. Rosenberg: No further questions.

(Witness excused).

GILBERT CHURCH, being a witness called on behalf of Plaintiffs, after having first been duly sworn, testified as follows:

Direct examination.

[fol. 65] By Mr. Carlson:

Q. I hand you, Mr. Church, Plaintiff's Exhibit No. 7 for identification. Will you please take the various [fol. 66] instruments and go through them and explain just what they are and the procedure normally used by each article therein?

A. Beginning with the first, top sheet, it is a purchase requisition which was completed by an employee of the du Pont Company, outlining the quantities and descriptions of materials which he wanted to purchase for use in the work. This purchase requisition received approval of authorized du Pont Company supervision. The next document is a request for quotation which was executed in the purchasing division and it lists upon the request for quotation quantities and description of materials and request for quotations forwarded to several vendors for submission

of bids. The back of the request for quotation contains detailed instructions to bidders. There are then three typical bids received by vendors. Next is a record of purchase which summarizes the quotations received, delivery information and quoted price. Record of purchase also shows the recommended vendor to be selected. It is signed by the du Pont Company and then submitted to the contracting officer or his delegate for his approval prior to making the commitment. Upon that record of purchase being approved by the contracting officer, or his delegate, a purchase order is then prepared by du Pont and this purchase order is issued to the vendor and is signed by the government representative before being released. The next document is a priority rating number which accompanied all purchase orders during the war at that time. The next document is an account payable voucher which was prepared by the vendor and sent to du Pont at the [fol. 67] time the material was shipped. The next document is a receiving report listing the material as received, signed by du Pont and in this particular instance initialed by a United States government representative.

Q. Right there, with the United States Government representative, what would he do before he would do that?

A. In this particular case it indicates he has checked it, in as much as his initial appears in the box with the word "checker" incorporated in it.

Q. That means he physically checked it?

A. I would assume that is what that means there, yes, sir. The next document is a public voucher for purchases and services other than personal, which was prepared by du Pont and submitted to the Manhattan District for reimbursement.

Mr. Rosenberg: May I interrupt here? Does this voucher include—the documents that have gone before, I understand relate to a single transaction?

A. That is correct.

Q. But this purchase voucher relates to a number of transactions in which this one happens to be included, is that correct?

A. That is correct.

By Mr. Carlson:

Q. It is in effect a reimbursement?

A. This is a request for reimbursement submitted to the Manhattan District by the du Pont Company and the first submission which is form No. 1085 is a listing of several [fol. 68] transactions which are submitted to the government for pre-audit. The government then, completing its audit, returns this to the du Pont Company and form 1034 is a public voucher for purchases and services. That is also submitted by du Pont Company for reimbursement. That again is signed by the contracting officer, or his representative, at which time he certifies the above articles were received in good condition after due inspection, acceptance and delivery prior to payment as required by law.

Q. Now, did this procedure apply to every purchase?

A. This procedure applied to every purchase for materials which was in excess of $2,000.

Q. Are you sure these are in the same order?

A. No, I am not. I will check them.

Mr. Carlson: I think, counsel, we had better clip this together. I will now offer in evidence Plaintiff's Exhibit No. 7 marked for identification.

[fol. 69] Mr. Rosenberg: We have no objection to them as evidence of the forms used in executing a typical transaction.

Mr. Carlson: I think that is the purpose for which they are being offered.

The Court: They may be admitted.

(Forms used illustrating typical transaction admitted in evidence and marked Plaintiff's Exhibit No. 7.)

Mr. Rosenberg: Do you intend to introduce similar documents for General Electric?

Mr. Carlson: Yes, We will have the man that is thoroughly familiar with that on the stand.

Q. Mr. Rosenberg asked the question of Mr. Vandenbulck about the use of General Electric or du Pont products and what was the practice while you were project manager during the period that you have testified to?

A. Du Pont products were used to a very limited extent and if at all possible when they were used computation was obtained from other vendors and prior to making the commitment on behalf of the project to the du Pont Company, the government approved in writing the placing of a purchase order with du Pont Company.

Q. He further asked the question as to what percentage of du Pont or General Electric products were used. Are you able——(interrupted).

A. I could only give an opinion on that. It is very, very small.

Q. When they were used, they were used on a competi-
[fols. 70-74] tive basis approved by the government representative?

A. Where possible to obtain competition and in every case with prior approval by the government.

[fol. 75] CHARLES VANDENBULCK, being recalled as a witness on behalf of Plaintiffs, having heretofore been duly sworn, testified as follows:

Cross examination.

By Mr. Rosenberg:

Q. I hand you Plaintiff's Exhibit No. 7 and refer to I think the form 6268?

A. No, the form is 1035, second sheet of the public voucher form.

Q. That is the reimbursement form?

A. That is right.

Q. Now, I would like to ask you about the details of that advance fund. The money first came from the govern-
[fol. 76] ment to the contractor, did it not?

A. That is correct.

Q. And how was it transferred, by government check?

A. That is right. The contractor submitted a standard form 1034 which merely had a statement on here advance fund in accordance with paragraph, or article so and so of the contract and the amount was indicated in the proper

column on the form. That amount was an agreement as to what they expected to spend, say, within a sixty day period, which was then set up and that voucher was then submitted to the government to pass on to their finance officer who drew the check on the strength of that standard voucher; delivered the check to du Pont. Du Pont then deposited that check in the special account. Therefore, after——(interrupted).

Q. In a banking institution?

A. In a banking institution that met the requirements set up in the contract. The contractor then proceeded——(interrupted).

Q. That was banked in du Pont's own name?

A. It was set up as a special account that clearly identified it with the contract and the checks that were drawn on it carried special symbols.

Q. Those checks were drawn in the name of du Pont, were they not?

A. Yes.

Q. And executed by officers of du Pont?

A. By the proper people authorized to sign checks.

Q. Then that money was expended by du Pont for various things such as this typical purchase, was it not?

[fols. 77-78] A. Yes.

Q. After du Pont expended the money, it then executed this voucher and got the government to reimburse for the amount expended?

A. That is right and the requirement was these reimbursements were to be redeposited to the revolving fund for the further use in the operation. In other words, this check in this case indicated it was drawn on the account of Lieutenant Colonel Bullock of the finance department in the amount of $15,559.55.

Q. He drew that to du Pont, or to repay them for money they had expended?

A. To be redeposited to the revolving fund.

Q. But, he didn't give them that check until they certified to him they had spent money in their own name?

A. That is correct. It was evidenced by the fact that the standard invoice form submitted by the vendor was

attached in support of these expenditures and invariably carried a check number that was drawn by du Pont against this special account. Periodically a representative of the Manhattan District would make a review of the checks drawn in that account tied in with these public vouchers for reimbursement and submit that to the general accounting office.

[fol. 79] GILBERT CHURCH, being recalled as a witness on behalf of the Plaintiffs, having heretofore been duly sworn, testified as follows:

Direct examination.

By Mr. Carlson:

Q. Mr. Church, handing you Plaintiff's Exhibit No. 10, so marked for identification, will you state what that is?

A. Photostatic copy of a check drawn by General Electric to a National Carbon Company, Incorporated.

Q. Now, did the du Pont—do you have first with you a photostatic copy of any du Pont check?

A. No, I do not.

Q. Were they in form similar to the exhibit you hold in your hand?

A. I think they were identical to the best of my memory.

Q. Except for the change of the names involved?

[fol. 80] A. Right.

Q. Did you use the same bank, Seattle First National Bank of Richland, do you recall?

A. This particular check is not drawn on Seattle First.

Q. Chemical Bank and Trust Company, do you remember the bank you used?

A. I know we used the Seattle First National Bank for payroll accounts and I believe all accounts.

Q. Now, I hand you Plaintiff's Exhibit No. 11, so marked for identification, what is that instrument?

A. That appears to be a payroll check.

Q. And would your same observation hold true with respect to the use of that sort of check by the du Pont Company?

A. Yes.

Mr. Carlson: I offer exhibits 10 and 11 in evidence.

By Mr. Rosenberg:

Q. May I ask you, in the first check, exhibit No. 10, Mr. McGuinn signs for the manager. Who is he and what does that indicate?

A. This is a check signed on behalf of General Electric Company by Mr. McGuinn who is signing for the manager of the Nucleonics department, Hanford Engineer Works.

Q. He is an employee of General Electric Company, is he not, Mr. McGuinn?

A. I am sure he is. Mr. Baker could testify to that.

Q. How about Mr. Christopher?

A. I don't know either of these two gentlemen. If it were du Pont, these signatures would both be du Pont employees.

Q. You have one for your project manager and one for, someone for the accounting department?

[fol. 81] A. As I recall the du Pont checks were signed by the accounting department and also the auditing department.

Q. And under this one, do you know who that is?

A. This is Mr. F. E. Baker, who is comptroller of General Electric.

[fol. 82] David F. Shaw, being a witness called on behalf of Plaintiffs, after having first been duly sworn, testified as follows:

Direct examination.

By Mr. Carlson:

Q. Will you state your full name, please?

A. David F. Shaw.

Q. Where do you live?

A. Richland, Washington.

Q. And what is your position there?

A. I am deputy manager of the Hanford operations office of the Atomic Energy Commission.

[fol. 83] Q. Mr. Shaw, will you just relate the positions and experience that you have had with the Manhattan District, or the Atomic Energy Commission?

A. I have been at Hanford since the first of July, 1947, in the positions of assistant and deputy manager. Prior to that time I was the director of security of the Manhattan District with headquarters in Oak Ridge, Tennessee, which position I held both in the army and as a civilian since March of 1946. Until the end of June, '47 I held that position with the Manhattan District. You wish me to go further back?

Q. Yes, I wish you would.

A. Prior to that time I was in active service in the army. Prior to that time I was chief engineer of Birmingham Slag Company, Birmingham, Alabama.

Q. Does the Atomic Energy Commission maintain a staff at Richland, Washington?

A. It does.

Q. For what purpose?

A. It maintains a staff of relatively small size numerically to supervise and control the operations of the commission which are carried on at Hanford Works, or administered from the Hanford operations office.

Q. And has that been true at all times since you have been there?

A. That has been true since I have been there and I have knowledge of the fact that that condition has existed since the inception of the project.

Q. Now, Mr. Shaw, I don't think the record at this point clearly shows the exact operation that is conducted at [fol. 84] Richland and its place in the national program. I wish you, in your own words, would just put that entire matter before the Court.

A. To properly describe the work which is performed at the Hanford Works, it will be necessary for me to, or I enter that part of the program in the total atomic energy program. The general program of the Atomic Energy Commission at the present time can be broken into two major fields. The research and development field and the field of production of weapons. In the research and development field there are basic as well as process research.

In the production of weapons field it logically breaks itself into two main programs. The production of fissionable material and production of weapons using such material. Hanford plays a part in the production of fissionable material. Our present program and I might interrupt myself to say while I don't propose to reveal any restricted data in this testimony, I will skirt close to it and if inadvertently I step over the line, I wish anything said here is for the use of the Court only. In the production of the usable fissionable material at the present time, it is all produced from one basic source material, natural uranium. This natural uranium is used in two ways. There is a radioactive isotope of uranium of which occurs in nature which is fissionable and it is possible by controlling a chain reaction, using natural uranium, to manufacture an artificial element known as plutonium which is also fissionable. The Atomic Energy Commission produces both of these materials at the present time. The Hanford Works is [fol. 85] involved in the production of the artificial element plutonium. It is obtained by irradiating natural uranium in a controlled chain reaction which causes a mutation of uranium through certain nucleolar steps which finally wind up with plutonium. The uranium originally comes from a, or is found both in this country and abroad. It is processed in various plants and located in various parts of this country and it is brought to the Hanford Works by the Atomic Energy Commission in the form of a refined metallic uranium. At the Hanford Works this refined met/al-ic uranium is prepared for charging into the reactor, or pile where this artificial plutonium is produced. It is put into the pile and the piles are located at the Hanford Works. It is left in it a period of time necessary for this nucleolar reaction to take place. It is then removed and the plutonium is chemically separated from the total production which results from this irradiation. Certain additional technical steps are taken to produce this plutonium to be in a form which we wish it to be in and the Atomic Energy Commission then moves that plutonium to other of its installations for further processing and ultimate disposition, which at the present time is the manufacture of weapons.

Q. How is that moved?

A. It is—I can't tell the Court how it is moved physically.

Q. I don't mean that. Under whose supervision and control?

A. It is in the possession of the Atomic Energy Commission. It is moved by our employees. It is of highly military security, the methods involved. Is that a reason-[fol. 86] able picture of what Hanford does?

Q. Yes. Now, when the source material is brought to Hanford, who actually owns it?

A. Well, the source material becomes the property of the Atomic Energy Commission when it is removed from the mines. That is a provision of law, I believe, that is contained in the Atomic Energy Act of 1946 that this—well, I don't know whether that is the case or not, but we own it, whether we have to or not, we do own it from the time it is removed from the ground. It is our property through all of its successive steps and it remains our property for final disposition and when it becomes fissionable, which occurs in this case while it has been irradiated, then it becomes, by provision of the act, necessary it be the property of the government.

Q. Now, this contract in your experience differs from other contracts in that the contractor is directed at all times exactly what to do and as a matter of fact doesn't know beforehand exactly what it is going to do, does it?

A. Well, of course, the contractor in this case is, by the terms of the contract, aware of the fact that he is going to operate the Hanford Works. By virtue of the changing nature of the requirements which we may have, he, the contractor does not know precisely what he will do from week to week or from month to month. It is perhaps worthy of mention that the quantity of fissionable material produced is tied directly in to the numbers of atomic weapons to be produced which in turn is a matter of determination by the President of the United States. So, that the speed at which this material will be produced [fol. 87] is something which the contractor can not have any knowledge of.

Q. Now, would the same answer be true with respect to the du Pont and General Electric contracts both?

A. I was not at Hanford Works while du Pont was the operating contractor there. I have knowledge, however, of the fact that the general operating techniques and general control of that production at Hanford Works has always been so controlled.

Q. Now, what security controls does the Atomic Energy Commission exercise at Hanford?

A. Well, to adequately describe that, it would be necessary for me to go into some detail as to the physical arrangement of the Hanford Works. Is that desired?

Q. I think so.

A. The Hanford Works is rather an extensive area, something in excess of 400,000 acres and the Works itself, the structures and plants wherein these operations are performed are not concentrated in one large industrial site. They are, instead, for reasons of security and safety separated into separate operating areas of which there are more than half a dozen. We maintain an exclusion of all unauthorized persons from all of our property at the Hanford Works, except the village of Richland. Access into this total area we permit only to those who have business therein and we actually control the ingress and egress of people by means of photo badges, the common means of identification. Within the total area each of the operating plants is physically secure through means of fencing, guard towers and actual patrolling by guards. Admission [fol. 88] into such areas is again subject to control in that only those with official business are permitted and again appropriate identifications are necessary to obtain such entry. Within the areas themselves there are extremely classified areas where still another screening is possible on the persons permitted to enter. Now, the determination of who is permitted to enter is controlled by the provisions of the Atomic Energy Act which prescribe that restricted data which can be held to be available to anyone who enters the most restricted of these areas, before such data can be available to anyone, they must have been investigated by the FBI and must have been approved by the Atomic Energy Commission. We do the screening

as we call it of such employees and we notify the contractor as to which of his employees we will permit to have access to this restricted data. We prescribe to him the methods that he will use in insuring that none but those who obtain that clearance and who are thereupon identified with appropriate badges and so forth shall enter the particular areas involved.

Q. I take it from your answer that there is a close intertwining and affiliation between the Atomic Energy Commission and the employees of the General Electric Company?

A. Well, that is inescapable in an operation of that sort. The determination of who is a cleared person and the action on approving a person must be made by the Atomic Energy Commission within the provisions of the act. Such a clearance would be pointless without ascertaining that [fol. 89] the physical steps are taken to insure that only such people are in fact permitted access to restricted data.

Q. Now, does your commission exercise certain controls over the activities of the principal contractors, subcontractors and all persons in the area?

A. Yes, we exercise a very considerable amount of controls.

Q. Can you just from memoranda you have prepared, or memory outline some of those controls to the Court?

A. Yes. If I may, I would like to refer to my memoranda which was prepared for me for another purpose, but which serves very admirably in the present instance.

Mr. Rosenberg: Did you say prepared for you, or by you?

A. For me.

By Mr. Carlson:

Q. Are you familiar with all the controls that are summarized in the paper you have in your hand?

A. I am indeed.

Q. And you just use it for the convenience of refreshing your memory?

A. Yes. I can do away with it, if you wish. It will enable me to go through these things in a more expeditious fashion.

Q. You may proceed from the memorandum.

The Court: The memorandum seems entirely proper.

A. In preparing this, we grouped the various controls into the subject the field in which we exercised the control and I will first just run through what those fields are and then we can go further into any of them you wish. We make specific authorization to the contractor to proceed with the commitments or expenditures of funds. We exer- [fol. 90] cise budgetary control, we exercise complete control over contracts, that is, sub-contracts let by the principal contractor. We exercise procurement controls, financial controls, production and technical controls, that is, over the process and production of the fissionable material itself; control of the engineering development and construction projects from the standpoint of design and quality of workmanship. We exercise controls over the employment policies of the contractor; over labor relations; over security; over equipment and property, which of course, are our property; over the safety program at the Works and over the operation of the community. There are other minor ones which are not worthy I think, of mentioning here. It is obvious from that list that we have controls over both those functions at the Works, which are directly concerned with the actual processes of plutonium manufacture and over those operations at the Works which are supporting the direct operations.

Q. Do these controls remain static or stationary, or do you change them from time to time?

A. We change them quite often.

Q. And you have the final say, so to speak, on what the controls over the contract in every department shall be and over every function?

A. When speaking for the Atomic Energy Commission, yes.

Q. Now, just to give the Court an idea what we are talking about, let's take control over some item like your authorization to proceed with commitments or expenditure of funds, would you just break that down and analyze that [fol. 91] a little further for the Court, what you do actually?

A. Yes. Our program for controlling expenditure of

funds is exercised in two ways. In the normal and recurrent program of the work, we exercise that control through the medium of budget allowances. For those aspects of the work which can be described and are described in our nomenclature as projects, we exercise a very rigid procedure of authorization of each particular project. In the case of construction projects which result in the creation of new plants or additions to existing plants which have, therefore, added to our total plant facilities, we require the submission to us by the contractor of a detailed proposal which sets forth the scope of the work proposed, the justification for it in terms of its relation to the supporting activity; the method by which this work will be constructed, the funds estimated as being necessary to do the work and the whole thing constitutes a request for authorization to proceed. In all cases those requests do not originate, that is, the idea does not originate with the contractor. We often request the contractor to request the project from us. It is purely a matter of administration that we do it in that way. In some cases these projects originate with the contractor, in some cases they are our idea. This proposal is reviewed by us and we go into the work sheets and so forth which the contractor used in arriving at his conclusions. We satisfy ourselves as to the adequacy in the engineering work represented in that thing and decide whether or not it is proper within our total program. So decided, we issue a directive to the contractor to proceed with the work, so all of his work [fol. 92] of this sort are covered by directives. We have a similar procedure for maintenance projects. We recognize the difficulty of purely repetitive, or routine things in the plants on this basis, but we feel we must exercise control completely over all such work, because it is our plant and we must control its use and deterioration and so forth, so we apply the same sort of procedure for maintenance projects using, however, a higher dollar value as the floor upon which we require this kind of an authorization. $5,000 construction projects and $20,000 maintenance projects require a separate authorization.

Q. Now, what controls do you exercise over sub-contractors?

A. Well, we exercise a considerable amount of control. That control, however, is in two types and I would like to have the question clarified a little for me. There is the matter of the principal contractors entering into sub-contracts and there is the further problem of the execution of the work under such a sub-contract. Which did you have reference to?

Q. I think you had better cover both of them. Take the first and then the second.

A. Well, when the contractor feels that a piece of work can be done expeditiously through the means of sub-contract, or when we believe it can be so done and make known our desires in that connection, the contractor proceeds. Here I would like to refer to my memorandum again; proceeds to initiate to us a declaration of intent to sub-contract. We indicate an approval, or concurrence thereon which authorizes the contractor to do a certain [fol. 93] piece of work on a sub-contracted basis. The administrative steps thereafter which culminate in the execution of such a contract and which I can summarize quickly as being first, the approval of the list of prospective bidders, the preparation and approval of an invitation to bid and the ultimate approval of the award are, in each case, reviewed and specifically approved by our staff before the contractor proceeds with the next logical step. Thus we screen the list of prospective bidders for security reasons, for check against the department of Justice lists of disqualified bidders before the contractor proceeds to prepare his bid assembly. When he does prepare his bid assembly we again review it to assure ourselves that the bid invitation will properly set forth everything involved and that the interests of the government will be adequately protected. Then when bids are received on the work the concurrence and selection of the successful bidder and ultimately our execution of approval on the document of the contract is accomplished. All of those steps are manual approvals. We actually sign the approval of these various documents.

Q. Now, I would like to go over to community controls for a moment, but before we do that, why were villages built for the housing of people and all the incidentals that

go with a small community at these various projects throughout the United States, physically, why was that done?

A. As was pointed out in some of yesterday's testimony, the basic criteria for the selection of the site for these reactors, since they were then and still are in a rather [fol. 94] embryonic state of development as a machine, required that the public safety be protected to the degree of locating these things in sparsely, or away from densely populated areas. It was not known then whether the chain reaction which occurs in an atomic reactor as well as in a bomb would be completely controlled and there would be danger from it. Experience has largely assured everyone that that can be adequately achieved, but the isolation factor was a very important one at the time located in an isolated area and plants which total in value originally in the vicinity of a third of a billion dollars and which with current expansion will exceed that considerably, twice or more, it was necessary to have a considerable operating staff. The necessity for a lot of supporting activity is quite obvious. Those activities involve the transportation of people and things to and from the plant, the provision of power plants and the like and the provision of adequate facilities for the worker's homes. Accordingly, though it is no part of the production of plutonium per se, it becomes an invaluable necessity that a community had to be created at the site of the work and it was so created. As such it is an adjunct to the plant and has to be operated.

Q. As a matter of fact, have you had to expand these communities during the past year?

A. The expansion of the community has been unfortunately necessary along with the expansion of the plant. Increased number of operating personnel has required us to enlarge them.

Q. Now, were all of these activities carried on in sub- [fol. 95] stantially the manner in which you have set forth prior to the transfer of these properties to the Atomic Energy Commission under the act?

A. Yes.

Q. And has the Atomic Energy Commission more or less

carried on the maintenance, operation, construction of these plants and these activities in about the same fashion as it was done prior to the transfer of these properties to the Atomic Energy Commission?

A. Essentially so. Of course, there has been the natural evolution of technique, both administrative and technical and there has been a considerable amount of firming up what had always been the actual method of accomplishing these things, but essentially the way of doing things at Hanford Works is the same now as it was prior to the Atomic Energy Commission's taking over.

Q. Now, I didn't mean to leave community controls. Just what controls do you exercise over the community of Richland, for example, in the State of Washington?

A. We exercise over that community all of the controls which are possible to exercise over a community. We have responsibility since it is our property to control the performance of the expansion work and development of the physical plant which is represented by the community. Accordingly, we have made a master plan of the community which we follow in considering improvements and changes in the village. We have created a small board to keep that plan under constant review. It is a joint board. We have contractor's people on the board as well as our own employees and we in that fashion and through the medium [fol. 96] of the directive procedure, which I previously described, which is as applicable to community construction as it is to the operation, we control the construction and maintenance work in the village, engineering aspects of it. With reference to the Hanford functions, applying both to the domiciles and to the commercial facilities, we participate rather intimately with the contractor in that rather than making it a program of proposal and approval. The rents which are established for the village homes are established by us. The collection of the rents is performed by the contractor. The maintenance of the homes and so forth is done by the contractor as a landlord function and again subject to the provision of our general control on the maintenance and construction of work. I think that pretty well covers the community control.

Q. Is Richland an incorporated community?

A. No, it is not.

Q. Does any person, firm or corporation own any of the fee, own any of the land in the village of Richland?

A. No. The real estate is owned entirely by the government.

Q. Do you maintain schools in Richland for the children of the people who reside there?

A. As I mentioned previously, in this testimony, we do not exercise our exclusion authority with regards the community. Richland is entirely open of access to anyone. The school district, which is school district 400 of the State of Washington is roughly coincidental in geographic extent with that part of our plant, our total real estate area which, over which we do not control the ingress and egress. [fol. 97] The school district functions just like any other school district in the state, in that it is part of the school system and it gets the per pupil annual allocations of money from the state Department of Education. It has, however, no real property taxes of any description and it would under the provisions of the State Department of Education, it would have been, it was apparently found impossible for the State to undertake to build the schools and defray all the expenses at Richland. Accordingly the Manhattan District and now the Atomic Energy Commission has constructed all of the schools which are now in use in Richland. Those comprise some five elementary schools, a junior high school and senior high school. One part of one of those structures was an original school in the old village. All the rest of it was built by us.

Q. And at your expense?

A. And at our expense. In addition to that, because the load of pupils——(interrupted).

Q. Excuse me, just a moment, you called your office for some data and it fits right into the testimony you are about to give. You did place such a call?

A. Yes, I did. With reference to the operation expenses of the schools it has been necessary for the Atomic Energy Commission to enter into contract with the school district to provide funds for the first 180 days of education of the new pupils in the school district, because of the procedure within the State whereby the State's distribution is de-

pendent on the previous year's average daily attendance. Since we have caused that average daily attendance to [fol. 98] fluctuate widely, we have undertaken to bear the expense of the first year of education of the incremental number of pupils each year. In addition to that we make a flat per pupil allowance which is in lieu of a lump sum deficit payment to the school. Originally in 19—well, prior to the current school year we had made lump sum deficit payment to the school for the net budget. We replaced that currently with a per pupil allowance which achieves the same end.

Q. Are you able to give the Court an idea of actually what you have distributed in the way of money?

A. If I may, I would like to develop this a little further in my own way.

Mr. Rosenberg: Are you testifying now with the memorandum just furnished you?

A. No, I am not.

Q. If you use it, are you willing to state it was prepared under your direction and supervision?

Mr. Carlson: He hasn't looked at it.

Mr. Rosenberg: I haven't any objection to the testimony, but I do think the record should show that if he is furnished with memoranda that it was prepared under his direction and under his supervision.

Mr. Carlson: The witness participated in all this himself——

Q. Isn't that true?

A. The actual typing wasn't done by me.

Mr. Rosenberg: We realize it is admissable for him to refresh his recollection where it was prepared under his [fol. 99] direction and supervision, but he hasn'- made that statement and I think the record should show that.

The Court: I think he stated that he knew the information in the first memorandum of his own knowledge and as to the second memorandum, there has been no attempt so far to use that. You may proceed.

A. I believe it is obvious I have ben using this rather ——(interrupted).

Mr. Carlson: Put it in your pocket.

A. In addition to the assistance which is rendered to the school district 400 which lies within our prescribed boundaries, we have found it necessary in providing for the welfare of our employees to make certain other school arrangements for the school districts which surround the village of Richland. There are six of these, Pasco, Kennewick, Benton City, Prosser, Grandview and Sunnyside. These towns have been greatly affected by the influx of employees who are actually gainfully employed on our project, but who do not live in our village. They live in these other communities. They have caused great increases in the problem of local government there and particularly in the school districts. We have, accordingly, entered into contract with those school districts whereby we are furnishing them payments equal to the average per pupil cost of education of the first 180 days. They prepare and submit to us lists of the pupils whose parents they have determined to be employees of the project and we make payments in accordance with contracts which we, the Atomic Energy Commission, have with those school [fol. 100] districts. In addition to that we have found it necessary to build them some structures. Approximately, oh, better than one third of the total enrollment of the Kennewick school district, for example, are pupils who have come into that school district new within the past two school years and whose parents are employed at the project. That is the reason that we have seen fit to accept this responsibility and here I would like to refresh my memory with this memorandum which is a result of the phone call to Richland.

Q. Was that to your own office and memorandum you have there in your office?

A. This was a telephone call placed from here, it was taken by Mr. Shank. It was placed to one of the representatives at Richland in our community management office who has this data currently in his possession. For the Richland school district in the past two years——(interrupted).

Mr. Rosenberg: Excuse me, are you willing to testify this data was prepared under your supervision and control?

A. Yes. The expenditures for construction of new plants for schools exceeded $10,000,000. The operating and maintenance payments made to the school district for the education of the children which, as I have explained, are above any contributions made by the State are in excess of $800,000. In the six surrounding school districts to which I made reference, construction allowances or payments in the amount of approximately $400,000 have been made and payment for current school operating expenses in excess of $700,000 have been made.

[fol. 101] The Court: At this time we will take a brief recess.

(Whereupon a short recess was taken. Upon reconvening the following proceedings were had and testimony taken, to-wit:)

By Mr. Carlson:

Q. Mr. Shaw, is power a large item on this project, the cost of it?

A. Yes. We are quite an important user of power and it is very vital to our operation. Electric power I suppose you mean?

Q. Yes. Who contracts for that?

A. The Atomic Energy Commission contracts with Bonneville Power Company.

Q. Does the Atomic Energy Commission furnish equipment for the project?

A. It must be understood that all of the equipment and materials which are incorporated into the plants and which are used in the operation of the plants is the property of the government and it is procured in some cases by the contractor and in some cases by the Atomic Energy Commission. A significant part of the installed machinery in the way of such things as electric motors and devices of that kind, instruments and most of the mobile equipment such as construction machinery, the motor vehicles and

the like are procured by the government and furnished to the contractor for his use.

Q. Does the town of Richland furnish its own fire protection force?

[fol. 102] A. Yes. We, in Richland is a fire department, the total cost of which is borne by the government as part of the operation of the community of Richland. The same is true of the police department.

Q. Now, how is the water furnished to the inhabitants of Richland?

A. Water and all the municipal services are part of the village operating budget which appears as part of the Atomic Energy Commission Hanford operation budget. It is operated by the General Electric Company and it furnishes all the water for the village. Likewise each one of the production plants has its own services as would be expected in the way of similar things.

Q. Who pays for keeping the streets clean and village clean?

A. Atomic Energy Commission. That is all in our operating budget.

Q. About how many employees are there on this project at the present time who are either under General Electric, or the Commission?

A. At the moment there is slightly over 8,000. That figure has been reduced somewhat of recent months. As of the first of the year there were approximately 8,900 of such employees. The figure is now about 8,100.

Q. Would that include the employees of sub-contractors?

A. No.

Q. Have you any idea of how many employees there would be that were under that category?

A. In that group I could only put the construction employees who are sub-contractor employees. At the present time there are in the vicinity of 9,000 employees and that [fol. 103] figure is down from a peak of something in excess of 16,000 which occurred during the past twelve months.

Q. Do the majority of them, of these people live in Richland?

A. As I explained earlier we have some family residents

in the village and we have a great number of employees who cannot be housed in the village and who are, accordingly, domiciled in the surrounding villages.

Mr. Carlson: That is all.

Cross examination.

By Mr. Rosenberg:

Q. Mr. Shaw, there were several places, two I remember specifically during your testimony when you spoke of having knowledge of prior procedures. You gained that knowledge through being informed by other persons?

A. I gained that knowledge in two ways. As deputy manager of this operation at the present time I have reason, of course, to refer to much old documentation on the operation of that plant. In addition to which having been director of security of the Manhattan District I made it my business to be somewhat, and it was part of my job to be in general familiar with the operating methods in effect at all of our installations so I could appropriately handle my security work.

Q. Now, during the course of your testimony you spoke about the close association of General Electric and Atomic Energy Commission personnel. Now, just again let's get this straight for the record. The Atomic Energy Commission employees are identifiable and at all times distinguish-[fol. 104] able from General Electric employees, are they not?

A. Absolutely.

Q. They are employees of the Federal government, are they not?

A. They are.

Q. And they are carried on a different payroll?

A. Yes, sir. They are Federal employees and paid on Treasury checks as distinguished with the General Electric employees who are paid on General Electric Company checks. The functioning of those operations, of course, is together, I mean, the total cost and total amount of money in the way of congressional, obtaining congressional money, it is all one.

Q. You are not intimating Atomic Energy Commission employees are paid out of this fund?

A. No, I am not. You are referring to the advance fund under the contract which was discussed yesterday?

Q. That is right.

A. Atomic Energy Commission employees are not paid out of that fund.

Q. They are paid out of appropriation made to the Atomic Energy Commission by the Congress of the United States?

A. That is right.

Q. Now, you spoke of certain payments made to school districts by the Atomic Energy Commission. It is true, is it not, that none of these payments figure in any way in the taxable amount included in the contracts here which are the subject of this suit?

A. I cannot answer that question. I don't know the answer. They are payments made directly by the Atomic [fol. 105] Energy Commission to the school district.

Q. And do not pass through the General Electric Company in any way?

A. That is true of the contracts for operating expenses of the school districts. That is not true of the money which is used for construction of school buildings in Richland.

Q. In Richland, yes, I understand that. Now, you spoke of the operation of certain governmental services, utility services, we will say water and so on by General Electric Company at this unincorporated village. Isn't it also true, isn't it true that the General Electric Company makes charges there in the operation such as utilities make in other cities of that type?

A. I prefer not to answer that straight yes or no, I would rather explain what actually takes place. I think I used the words municipal functions rather than governmental, the services performed and rendered to the residents by the company. A flat rental rate which is established by the Atomic Energy Commission is charged the residents. There is no separate charge made for the water and electricity.

Q. That is all included in the charge. Now, that charge

is made by General Electric to the tenants individually, is it not?

A. That is correct.

Q. And what does General Electric do with that money?

A. It puts it into their, it is in accounts receivable to the company. It goes into the working fund which they have in the operation of the contract.

[fol. 106] Q. And from which they reimburse the advance fund, is that not right?

A. It is the advance fund. It is the same fund. It is a collection for the fund just as much a reimbursement which we make to them as payment on the fund.

Q. Now, is it not true also that General Electric has other income from rental of properties in the community which also goes into that fund?

A. Other than what?

Q. Other than your income from rentals to individuals for housing purposes?

A. Yes. There are commercial enterprises in the village.

Q. Is it not true each commercial enterprise in the village of Richland pays, makes some kind of payment to General Electric Company?

A. That is true. All of the collections in the village are made by the General Electric Company.

Q. And is it not true there is a very substantial income to General Electric in all of this operation which goes to that government advance fund and it is credited to it?

A. Well, it is substantial in terms of dollars. It is not substantial in terms of total scope of the project.

Q. Are you prepared to say how much it is, can you say without violating security?

A. I could say without violating security, but I don't know the precise figure and I would not wish to depend on my memory.

Q. Isn't it true that the commercial enterprises are charged on a percentage of their gross income for the concessions and rentals and so on, a flat charge?

[fol. 107] A. That is the normal method of entering into concession area contracts. It is not uniformly true, but that is true in most cases.

Q. Now, you spoke of the number of employees at this

project. Some of them are employed by General Electric Company, are they not and some by sub-contractors and some by the Atomic Energy Commission, now in your figure of 8,900 which dwindled to 8,100, did you include both Atomic Energy Commission employees and General Electric employees?

A. I did.

Q. Can you tell us, without violating security, the number of each?

A. There are 343 Atomic Energy Commission employees at the present time and that number has not varied more than a half a dozen over the past twelve months; the difference representing General Electric Company.

Mr. Rosenberg: That is all, Mr. Shaw.

Redirect examination.

By Mr. Carlson:

Q. Mr. Rosenberg asked you about the actual receiving of checks by the Atomic Energy Commission employees and those employed under General Electric, but ultimately where does all that money come from for the payment of both?

A. Well, to answer that adequately I must describe the budget procedure and basic financing of the Atomic Energy program.

[fol. 108] Q. I think it would be well to have it in the record, Mr. Shaw?

A. The Atomic Energy program is conducted as a governmental agency with annual appropriations. There are some peculiarities about the budgeting procedure for the Atomic Energy Commission in connection with matters of the continuing application of money, that is, the right to incur contractural obligations. But, to liquidate those obligations and to make all current expenditures, annual appropriations in lump sums are given to the Atomic Energy Commission by Congress. Those sums are justified by the Atomic Energy Commission by explaining in its budget submission for what purposes and specifically how it proposes to use the money that it gets. Therefore,

in the submission which substantiates our obtaining of funds, we explain what is the best we can predict as what we will be doing in our various plants in the ensuing period of time. When the receipt of this lump sum of money is made by the Commission, it then allocates periodically to all of the operation offices the funds with which they are to defray their total obligations. Their total obligations comprise in our case the payment of contractors which are direct contractors of ours, including the General Electric Company and the payment of our own people.

Mr. Green: May it please the Court, may I here have permission to ask one question?

The Court: Certainly.

By Mr. Green:

Q. Mr. Shaw, on his cross examination Mr. Rosenberg in [fol. 109] putting his questions to you by way of the statement, is it not true that General Electric derives income from the collection of rents or rentals and another time he asked if it is not true that General Electric derives substantial income by way of collections of rent or rentals and in your answer you said that it did and that it was placed by du Pont in the advance fund. This is simply to clarify the record. You did not by that answer mean to imply or infer that the rents were the property of General Electric, did you?

A. No. The rents accrued are in partial defrayment of the cost of operating that town which is a function of the Atomic Energy Commission. The Atomic Energy Commission in making available for expenditure by the company the funds necessary to operate that village. Any return in partial defrayment of those expenses I would consider of the some sort of money as the money which was expended for them in the first place, which was our money.

Mr. Green: That is all.

Recross examination.

By Mr. Rosenberg:

Q. Mr. Shaw, you realize that the last question that was asked you asked you to make a legal determination as to whose property that money is at the time General Electric collects it, didn't you? You actually don't know, you haven't made a legal analysis of that question, have you?

A. I think, Mr. Rosenberg, you will find that I said that [fol. 110] I considered that money to be the same kind of money.

Q. Yes, I understand that, Mr. Shaw, but I am asking you now whether you could say a flat yes or no as to whose property that money was at any given instant; that you haven't made a legal analysis of that point?

A. Well, I think in the wording I used in my reply was as much as I could use. I don't propose to be able to—maybe you had better rephrase your question and ask me that again.

Q. Well, did you know of your own knowledge the answer to the legal question of whose property this rental collection is——(interrupted).

Mr. Green: The witness has not been asked any such question. The question which was put to the witness was to clarify an answer made to what I considered to be a confusing question. The questions put by Mr. Rosenberg contained the statement once that General Electric derived income and the other statement was that General Electric derived substantial income. The question was to put in this record that this witness did not mean to infer that what General Electric collected from rents was income or anything else. He was not to be bound by the characterization—that his answer was to trace the course of the money, not to determine the money's nature.

Mr. Rosenberg: If the record may show that all this witness can testify to, or knows is that General Electric [fol. 111] collects certain amounts of money which go into this advance fund, then we are satisfied.

Mr. Green: That is what he testified to.

A. That is rental money. It is our property which is rented to tenants, or business men as the case may be and the General Electric Company makes the collection of the rental money.

By Mr. Rosenberg:

Q. Now, let me ask you this, Mr. Shaw. Do you know of your own knowledge exactly how those collections are handled, how they are banked, that sort of thing, what kind of transmittal is made to the advance fund, those details?

Mr. Carlson: We are going to put a witness on next to cover that matter. If he knows, I have no objection to his answering.

Mr. Rosenberg: I think if there is another witness better prepared.

A. I am sufficiently acquainted with those subjects to discharge my functions, but as to the techniques involved in the actual transfer of the money, I would prefer someone else to testify.

By Mr. Rosenberg:

Q. You spoke about the allocation of sums of money by the Atomic Energy Commission from its appropriation to these various projects, or divisions. How is it determined as to the amount that shall be in this advance fund for the project at Hanford? Do you ask in your budget request for monies for that advance fund?

A. The advance fund starts out at a certain level at the [fol. 112] beginning of the year and we ask for sufficient money, cash during the year to keep that fund at a workable level. In other words, we ask for what we are going to spend during the year. Once set up it is not necessary to involve that in the request of funds.

Q. I understand that, but here is the point I want clarified. Is the advance fund something that is set up within the bosom of the commission from the total amount available for construction and operation in the appropriation, or is it so earmarked simply advance fund?

A. Well, I don't know I can answer that other than the

way I answered the last question and that is that the fund is there. It is repaid as the—I mean, money is put into it as reimbursement vouchers are processed and the payment is made out of the treasury.

Q. When Congress makes an appropriation to the Atomic Energy Commission I understand from your testimony it is a lump sum, is that correct?

A. That is right.

Q. Now, then it is up to the Commission then to decide how to spend that?

A. Yes.

Q. And then the allocation of those funds are made to the various districts throughout the country?

A. For the various operational offices of which we are one.

Q. When they make an allocation, do they make it with respect to the budget, or allocation to your advance fund?

A. They make a total sum of money available to us. Now, they have justified how we propose to spend it. Therefore, we are limited and can't spend it for something [fol. 113] we have not advised the Congress as to our intention.

Mr. Rosenberg: You have covered it, thank you.

Mr. Carlson: That is all.

(Witness excused.)

Forrest E. Baker, being a witness called on behalf of Plaintiff, after having first been duly sworn, testified as follows:

Direct examination.

By Mr. Carlson:

Q. State your full name, please?

A. Forrest E. Baker.

Q. Where do you live, Mr. Baker?

A. Richland, Washington.

Q. What is your position with the General Electric Company there?

A. I am assistant secretary of the company and controller of the company's nucleonics department.

Q. How long have you resided at Richland?

A. Since July of 1946.

Q. Continuously?

A. Yes.

Q. Approximately how many employees are there at Richland now, both General Electric and Atomic Energy Commission employees?

A. Approximately 8,100.

Q. Does that include the employees of sub-contractors?

A. No. The 8,100 figure represents General Electric [fol. 114] employees and Atomic Energy Commission employees. The sub-contractor employees approximate 9,000 or 10,000.

Q. Now, Mr. Baker, you heard the testimony a few moments ago concerning how the receipts from the rental of houses and business properties are received?

A. I did.

Q. Will you just, in your own way, explain the procedure that takes place for the collection of rentals, in the handling of those properties—it might be well to back up a little bit there and go over this advance fund that the General Electric Company has first and we will come back to that?

A. The amount of the advance fund is determined by an estimate of requirements for perhaps a month or two. The estimate is arrived at mutually by the Commission and General Electric based on anticipated expenditures. The amount of the advance is always dependent upon the speed with which the individual pieces of paper representing disbursements are processed through the necessary routines prescribed by the Atomic Energy Commission which then permits replenishing the fund. In the case of cash receipts when collected by General Electric, these cash receipts are deposited in the advance account and act as a reduction in the reimbursement required to build up the fund. A substantial portion of the house rents in Richland are collected by payroll deductions. This transaction, of course, does not involve cash in that the amount of money, amount of cash paid to the individual employee has been reduced by the amount that he has authorized to be deducted

from his pay for rent. Other, the remainder of the [fol. 115] rents for residential properties are collected in cash. This cash is deposited in the advance account and again acts as a reduction in the amount of the reimbursements that are required to replenish the fund.

Q. In the performance of the contract does General Electric expend or was it expected to expend any of its own funds whatsoever in any amount?

A. It has never been the intention of the General Electric Company to expend any of its own funds in activities under this contract.

Q. Does the General Electric Company have physically any of its own funds at Hanford?

A. There are no sums of General Electric cash at Hanford.

Q. Has it, during the time that you have been there, had any funds over there?

A. No.

Q. Now, the State has requested us to go through as briefly as you can, but fully, just exactly how you place an order and buy material under your contract for the project. I may not have those in absolute chronological order, so feel free to take time and look at them. I might say, Mr. Baker, this is proposed for the record so the Court can review each document. If you can identify them by taking some number off the contract as you go along so the record will be identifiable back to the exhibit.

A. In the case of a purchase of material by General Electric, the first document involved is identified as a purchase requisition. This purchase requisition is [fol. 116] originated by the individual who requires the material. He indicates what he needs, the quantity, the date he requires it. This document is then referred to the General Electric purchasing division. The General Electric purchasing division obtains approval of the Atomic Energy Commission to enter into negotiations for the purchase of the material specified on this purchase requisition. When such approval is obtained, the second form identified as request for quotation is mailed to a list of suppliers which list has been previously approved by the Atomic Energy Commission. Upon return from various bidders

of this request for quotation, the purchasing division selects one of the bidders on which the purchase order will be placed. There are a number of reasons given for selecting an individual vendor. These reasons are shown on the next document in the procedure identified as record of purchase. The record of purchase lists the quotations which were received, the price quoted, terms and so forth, the selected bidder, one of nine reasons for selecting that bidder. This form is then forwarded to the Atomic Energy Commission for its approval. The approval is obtained in advance of the release of the purchase order, if the amount of the purchase is in excess of $2,000 for construction material, or $5,000 for other material. Upon receipt of approval by the Atomic Energy Commission to place a purchase order——(interrupted).

Q. Excuse me, is that not on the instrument, the approval?

A. Yes, approval of the United States government is shown on the form record of purchase. Upon receipt of the [fol. 117] Commission's approval on the record of purchase, a purchase order is issued. That is the next document in the procedure. This document consists of an original and four copies. The distribution of the various copies is indicated on each copy of the form.

Q. Does the United States government, or Atomic Energy Commission get a copy of that?

A. The United States government gets copies number 3 and number 4. The original of the purchase order is mailed to the vendor and the next document in the procedure is a post card identified as acknowledgment of order and delivery promise.

Q. Who is that received from?

A. This is received from the supplier of the material and used by the purchasing division as an expediting document. If during the process of supplying the material there is any change to be made in either quantity or specifications, another document is used identified as alteration to purchase order. It is similar to the purchase order form, consists of an original and four copies, two of which are furnished to the Atomic Energy Commission. When the material ordered on the purchase order is received, a

receiving report which is the next document in this procedure is prepared. This document provides a ditto master from which can be prepared the required number of copies of the receiving report. The required number varies by the nature of the material being purchased. In all instances copies are furnished to the Atomic Energy Commission for their check and review of the material received. The next step in the procedure is receipt of [fol. 118] an invoice from the vendor. For accounting convenience we have asked our suppliers to prepare their invoices on our form. It consists of nine copies so that the necessary distribution can be made within the General Electric organization and the Commission's organization. The distribution of the nine copies is shown on the form. The government receives the original and number 3 copy and number 5 copy, the number 8 copy and number 9 copy.

Q. Then how is payment actually made to the supplier?

A. Upon receipt of proper approvals, comparison with receiving reports, audit of arithmetical invoices, verification of the FOB terms and other terms of the purchase order, a check is issued to the vendor drawn against this advance account.

Q. Would Plaintiff's exhibit No. 10 be a typical check that you have referred to?

A. Yes, sir. This is the form of check that is issued by General Electric Company against the advance account for payment of purchases under the routine I have just described.

Q. Mr. Rosenberg was concerned yesterday about the signatories on that check. Can you tell him who they are?

A. Mr. B. A. McGuinn and——

(At this point in the proceedings, the time being immediately before noon, a severe earthquake was experienced in Olympia, Washington.)

The Court: We will adjourn until one-thirty.

[fol. 119] (Whereupon a recess was taken until one-thirty o'clock P. M. Upon reconvening at this time the following proceedings were had and testimony taken, to-wit.)

By Mr. Carlson:

Q. Now, Mr. Baker, before we had the slight interruption before lunch, you had gone through all the documents contained in Plaintiff's exhbit No. 12 so marked for identification, had you not?

A. Yes, sir, these are the ones I discussed.

Mr. Carlson: I now offer Plaintiff's Exhibit No. 12 in evidence.

Mr. Kaminoff: No objection.

The Court: They may be admitted.

(General Electric Company forms used in executing a typical purchase admitted in evidence and marked Plaintiff's Exhibit No. 12.)

By Mr. Carlson:

Q. These checks referred to as Plaintiff's exhibits 10 and 11 show the payor as General Electric Company, G. E. Nucleonics Project, contract W-31-109 Eng. 52 Account. Is that true of all checks that are issued under the contract?

A. Yes, that legend appears on all checks that we use.

Q. Both payroll and to——

A. Both for payroll and for purchases of materials and payment for services.

Q. Do you have other than the two accounts as shown in exhibits 10 and 11?

[fol. 120] A. Yes, we have other accounts. We have an account with the Chemical Bank and Trust Company in New York, New York of which this is a sample of the check.

Q. When you say this, you mean Plaintiff's Exhibit No. 10?

A. Yes, Plaintiff's Exhibit No. 10. We also have an account with the Richmond branch of Seattle First National Bank similar in all respects to Exhibit No. 10 except for the name of the Bank. Exhibit No. 11 refers to salary account No. 1 with the Seattle First National Bank, Richland office. We have another payroll account with the same branch designated as salary account No. 2. We have a third payroll account with the main office of the

Seattle First National Bank designated as payroll, not payroll but salary account No. 3.

Q. Are all of the funds that go into those banks provided in the manner which you have heard Mr. Shaw testify to and generally referable to as the advance account?

A. Yes, all of the funds used by General Electric at Hanford, regardless of the bank account in which they are handled, represent the advance from the Atomic Energy Commission.

Q. That would be true of the account of the Chemical Bank and trust Company in New York, New York?

A. Yes.

Q. Exhibit No. 11 bears the signature under the account number of F. E. Baker. Is that your signature?

A. That is my facsimile signature.

Q. In the course of your employment, did you have, or have you had occasion to examine the checks as written by the du Pont Company under the prior contract to your [fol. 121] contract, are they substantially in the same form and issued in the same manner?

A. Yes. At the time General Electric took over operation of the Hanford Works from the du Pont Company, we patterned most of the accounting forms used in our work after those that were already in use by the du Pont Company. We merely changed the name from du Pont to General Electric, changed the name, changed the number of the contract that was referred to on those documents.

Mr. Green: So the du Pont checks bear on their face the reference to the du Pont contract as numbered and lettered?

A. Rather than General Elecrtic contract number.

By Mr. Carlson:

Q. Mr. Baker, could you give the Court an idea of the amount that was paid by the General Electric Company during the year 1948 in the way of salaries to people directly employed in the State of Washington? I appreciate——

A. I can probably best give the total payroll during the

year 1948 for General Electric employees and sub-contractor employees. This would approximate $87,000,000.

Mr. Carlson: That is all.

Cross examination.

By Mr. Rosenberg:

Q. Do you know Mr. Baker, what the monthly revenue is which General Electric collects from rentals and concessionaires at the Hanford area?

A. The going rate is approximately $5,000,000 per year. [fol. 122] Mr. Carlson: That would be both houses and buildings, commercial buildings?

A. That is right.

By Mr. Rosenberg:

Q. Would you tell us how you determine, let's take the concessionaires first, how you determine their payments, the amount of their payments?

A. The amount payable by each concessionaire is set forth in a contract which has been negotiated through competitive bidding with approval of the commission.

Q. The contract is one between General Electric and the concessionaire, is it?

A. It is. Each contract bearing the approval of the Atomic Energy Commission.

Q. And how do you arrive at the amount which the concessionaire is required to pay in your contract negotiations, how do you determine that amount?

A. There are a number of bases. In some instances the payment represents a percentage of gross business done by the concessionaire. In other instances the payment represents a flat sum of money per month. I think that covers it.

Q. Don't you have competitive bids?

A. In the awarding of concession contracts, yes, there are competitive bids.

Q. Then, how do you determine the amount of rentals for dwellings and that sort of thing?

A. Those rentals on the dwelling houses are those which are established by the Commission.

Q. Do they change from time to time?

[fol. 123] A. To my knowledge those basic rents for the houses that were in effect in September of 1946 when General Electric came to Richland have not been changed. There, however, have been modifications in individual rent payments which came about as result of the sale of furniture to the resident.

Q. Is there any change in the rate contemplated at the present time that you know of?

A. There have been some discussions on the subject, but as to their present status I do not know.

Mr. Carlson: Yes, right there may I ask a question?

Q. How about the rates on new homes that have been built in the last year?

A. All of those were determined by the Commission.

By Mr. Rosenberg:

Q. Now, will you look at this exhibit 12, the form request for quotation?

Mr. Carlson: Mr. Rosenberg, I suggest we might save time if you hand him that.

A. I have it.

By Mr. Rosenberg:

Q. Now, just to save the Court's time here, with respect to the more pertinent parts of these forms I would like to call the Court's attention to portions of this and have you verify them as I point them out. That order form is headed by the name and symbol of General Electric Company, is it not?

A. Yes.

Q. In the upper left hand corner and special instruction No. 2 requires the bidders to address quotation to General [fol. 124] Electric Company, does it not?

A. Yes.

Q. And in the lower right hand corner the request for

quotation is executed by the General Electric Company, is it not?

A. Yes.

Q. Then on the purchase order—excuse me, let's stay with the quotation form. On the reverse side of the request for quotation, the procedure in rendering quotations, I would like to ask you to verify the first paragraph there, it reads as follows. "The General Electric Company has entered into a contract with the United States Government, represented by the United States Atomic Energy Commission, hereinafter called the "Commission," for the operation, expansion and maintenance of the Hanford Works, Richland, Washington. This quotation is requested in the furtherance of the performance of the work provided for in that contract. Nothing contained herein shall be construed to bind or purport to bind the United States Government." Is that the correct wording?

A. That is the correct wording with the exception that you omitted the contract number "W-31-109 Eng-52".

Q. Thank you. Now, under condition No. 6 relating to taxes, does it not read as follows. Taxes. Seller agrees that any taxes imposed by law upon or on account of the within material are for its account unless otherwise agreed. This purchase is made for resale to the United States Government, therefore the Washington retail sales tax and the compensating tax are not applicable thereto. [fol. 125] (Administrative ruling, excise tax division, Tax Commission of the State of Washington, Vol. III, AR No. 9)."

A. Yes, sir, that is the wording.

Q. And then provision No. 11 under conditions, does it not read as follows? "Assignment, This order is assignable to the Commission. In the event of assignment to and acceptance by the Commission, seller agrees to look solely to the Commission for payment under this order. Seller shall not assign this order or any interest therein including proceeds nor sub-contract any portion of the work to be performed without the buyer's prior written consent, and the buyer shall be entitled at all times to set off any amount owing from the seller to the buyer or any of its affiliated companies against any amount due or owing to the seller

with respect to this order. (The purchase of raw materials or standard or commercial articles is not to be deemed a sub-contract within the meaning of this condition)."

A. It so reads.

Q. Thank you. Now, on purchase order form—— (Interrupted).

Mr. Carlson: We will agree that all the printed matter set forth on those exhibits exist on there.

Mr. Rosenberg: As I stated when I first started questioning Mr. Shaw in this way, the Court has asked for the things we considered pertinent pointed out to him and that is our purpose in doing this.

Q. That purchase order form, Mr. Baker, contains the heading and the symbol of the General Electric Company [fol. 126] on its face, does it not?

A. Yes.

Q. And the sellers are required and directed to prepare General Electric invoice set, are they not?

A. Yes.

Q. And to mail invoices to the General Electric Company?

A. Yes.

Q. And to ship to General Electric Company?

A. Yes.

Q. And the order is signed by General Electric Company?

A. Yes.

Q. Now, on the reverse side under the terms, conditions and instructions, does it not contain this language? "The General Electric Company, hereinafter called the "buyer", has entered into a contract", omitting the number, "With the United States Government, represented by the United States Atomic Energy Commission, hereinafter called the "Commission", for the operation, expansion and maintenance of the Hanford Works, Richland, Washington. This purchase order is entered into in furtherance of the performance of the work provided for in that contract. Nothing contained herein shall be construed to bind or purport to bind the United States Government, its officers or agents."

A. Yes.

Q. And then the order is made subject to certain terms and provisions, is it not, including No. 6 relating to taxes which is substantially the same as that contained on the quotation form?

A. Yes.

[fol. 127] Q. And No. 11 relating to assignment providing that the order may be assigned to the Commission?

A. Yes.

Mr. Rosenberg: I have no further questions.

Redirect examination.

By Mr. Carlson:

Q. Mr. Baker, does the General Electric Company under its contract pay a retail sales tax to the State of Washington on materials purchased going into the project over there, into construction first?

A. I am not quite sure I understand the question. I can say that there is a sales tax paid to the State of Washington which represents General Electric's collection of the tax on its retail sales.

Q. I mean in particular now, for example, if you bought materials under a purchase order like the exhibit that Mr. Rosenberg has read from going into the account for construction of the plant, do you pay a tax on that?

A. We do not.

Mr. Rosenberg: Mr. Carlson, the purchase order refers to a ruling of the Tax Commission and that will be put into this record later.

Mr. Carlson: Then I won't develop it any more. I think that is all.

Mr. Rosenberg: We have no further questions.

(Witness excused.)

[fol. 128] The Court: At this time we will adjourn until ten o'clock tomorrow morning.

(Whereupon a recess was taken until ten o'clock A. M. on Thursday, the 14th day of April, 1949. At this time

the following proceedings were had and testimony taken, to-wit:)

INTRODUCTION OF EXHIBITS

Mr. Carlson: If the Court please, you will recall that in connection with the General Electric contract that was introduced as an exhibit herein, that Mr. Harris stated there were portions of a supplemental agreement, being No. 1 of the contract, that might be deemed material to the issues herein. Mr. Harris will prepare those portions that he has in mind that are declassified and we will send them into the clerk of the court following the closing of the hearing, if we can't get them today. I don't think they have to take an exhibit number, do you Mr. Rosenberg?

Mr. Rosenberg: I think they may be added to the contract that is now in evidence, if the Court please.

Mr. Carlson: They will then be attached to Exhibit 3.

Mr. Rosenberg: That is the General Electric contract, is it not?

Mr. Carlson: That is right.

Mr. Rosenberg: These supplements do not pertain to the du Pont——

[fol. 129] Mr. Carlson: No.

Mr. Rosenberg: All in regard to the du Pont contract is now in the record?

Mr. Carlson: That is right.

The Court: At this time, Gentlemen, I might suggest that before the close of this trial it might be well if some agreement were reached regarding these exhibits as to which ones are material to the General Electric case and which ones are material to the du Pont case so that later when statements of fact are ordered, there will be no question as to which exhibit is for which statement of facts.

Mr. Carlson: We have already discussed that and I think at the close of the hearing we will make a joint statement on that.

The Court: I think it would be advisable if some agreement were reached on the matter.

Mr. Carlson: Your Honor please, Plaintiff's exhibit No. 13 is a letter bearing date May 8, 1946, written by Major General L. R. Groves, United States Army to Mr. C. E.

Wilson, President General Electric Company, New York, New York. We would like to offer this letter in evidence with the understanding that we may substitute a copy thereof. Your clerk has consented to make such a copy for us today.

Mr. Rosenberg: No objection.

[fol. 130] The Court: It may be admitted.

(Groves letter, May 8, 1946, to Wilson admitted in evidence and marked Plaintiff's Exhibit No. 13.)

Mr. Carlson: Plaintiff's proposed Exhibit No. 14 is a letter bearing date May 28, 1946, addressed to Major General L. R. Groves, War Department, Washington, D. C., from Mr. C. E. Wilson, President of General Electric Company, or C. E. Wilson. I would particularly like to call the Court's attention to the first paragraph on the second page thereof which reads as follows. "Because of the many uncertainties involved in this project, I feel that any contract we enter into should insure to us a full recovery of all costs which we incur in connection with it, and should protect us against any liabilities which may result, since hazards of an unusual and unpredictable nature are involved. On the other hand, because of the tremendous national importance of this project, we do not expect, nor are we willing to accept, a profit on this contract, and therefore, will undertake it only on the basis of full cost-plus a fee of one dollar." I would like to offer Exhibit No. 14 in evidence with the same understanding that [fol. 131] a copy may be substituted therefore.

Mr. Rosenberg: No objection.

The Court: There being no objection, it may be admitted.

(Letter, May 28, 1946, from Wilson to Groves, admitted in evidence and marked Plaintiff's Exhibit No. 14.)

Mr. Carlson: Plaintiff's Exhibit No. 15, so marked for identification—letter from General Groves to C. E. Wilson will be 13 and letter in reply to that letter from Mr. Wilson to Groves will be 14. Proposed Exhibit No. 15 is a letter of October 18, 1944 addressed to the Washington Tax Commission, Olympia, Washington to the attention of Mr. T. M. Jenner submitted by E. I. du Pont de Nemours and

Company by R. R. Pippin, assistant comptroller and the United States of America by K. D. Nichols, district engineer. This is a copy of the letter, but I understand counsel makes no objection on the ground of its being a copy.

Mr. Rosenberg: I prepared for the State copies of that.

Mr. Carlson: I wonder if it would be a good thing to attach that to our typewritten copy, because it is much easier to read. I now offer in evidence Plaintiff's Exhibit No. 15.

[fol. 132] Mr. Rosenberg: Mr. Kaminoff says that is a photostat of a copy.

Mr. Carlson: Then, that doesn't help us. Any objection to that exhibit?

Mr. Rosenberg: No objection.

The Court: It may be admitted.

(Letter of October 18, 1944, to the Tax Commission from Pippin and Nichols admitted in evidence and marked Plaintiff's Exhibit No. 15.)

Mr. Carlson: Can we stipulate and agree that this letter was sent by United States Mail to Mr. Jenner and that it was recevied by him in the ordinary course of the mail which I believe would be about four days. Do you know what day you received it?

Mr. Green: That was agreed between Mr. Jenner and myself in early conference.

Mr. Rosenberg: For the purpose of the record we will stipulate it was received in the ordinary course of the mail.

Mr. Carlson: Plaintiff's proposed exhibit No. 16 is a letter bearing date January 15, 1947 addressed to the E. I. du Pont de Nemours and Company at their Wilmington, Delaware office to the attention of Mr. R. R. Pippin, signed by the Tax Commission of the State of Washington by T. M. Jenner, Commissioner. May it be stipulated between counsel this is a correct copy of the original letter?

[fol. 133] Mr. Rosenberg: It may be so stipulated.

Mr. Carlson: I now offer Plaintiff's Exhibit No. 16 in evidence.

The Court: It may be admitted.

(Letter of January 15, 1947, from Jenner to the du Pont Company admitted in evidence and marked Plaintiff's Exhibit No. 16.)

Mr. Carlson: Plaintiff's Exhibit No. 17 is a letter from D. H. Lauder, Works manager of the General Electric Company to the area manager, Hanford Engineer Works bearing date of June 6, 1947. It is introduced in evidence, or proposed to be introduced in evidence to show examples of the controls that were exercised as outlined on the witness stand by Mr. David Shaw yesterday. This is offered on the part of the Plaintiff as a typical example and as I might say to show the extreme care exercised in all matters pertaining to controls. This happens to relate to a proposed safety contest. I offer Plaintiff's Exhibit No. 17 in evidence.

Mr. Rosenberg: There is no objection.

The Court: It may be admitted.

(Letter of June 6, 1947, relative to safety contest admitted in evidence and marked Plaintiff's Exhibit No. 17.)

[fol. 134] Mr. Carlson: There is no objection to the form in that it is a photostatic copy?

Mr. Rosenberg: No.

Mr. Carlson: Plaintiff's proposed Exhibit No. 18 is a letter bearing date December 27, 1946, from D. H. Lauder, Hanford Engineer Works to the area engineer at Richland, Washington relating to the accounts receivable—telephone account. This I might say Your Honor, has been picked out as an extreme example of the exercise of the same controls discussed by Mr. Shaw and other witnesses and relates to some accounts receivable in the nature of telephone accounts which were very small amounts, 5c, 1c and so forth. The nature of the request is, of course, self evident when the letter is read, but it is for the purpose of writing off amounts like 1c and 5c and so forth for telephone calls placed. We now offer Plaintiff's Exhibit No. 18.

Mr. Rosenberg: Exhibit No. 18 is a photostatic copy of an original letter by General Electric requesting permission to write off certain balances, is it not?

Mr. Carlson: That is right.

Mr. Rosenberg: In the accounting with the Atomic Energy Commission?

Mr. Carlson: That is right.

Mr. Rosenberg: There will be no objection.

[fols. 135-146] The Court: It may be admitted.

(Letter of December 27, 1946, relating to telephone calls admitted in evidence and marked Plaintiff's Exhibit No. 18.)

Mr. Carlson: Plaintiff's proposed Exhibit No. 19 is a letter of August 22, 1946, addressed to Mr. William H. Milton, Jr., administrator, Nucleonics Project, General Electric Company, signed by Frederick J. Clarke, Lieutenant Colonel, Corps of Engineers, area engineer, relating to a proposal in accounting. It is very short. "Confirming our conversation of 16 August 1946, this office has no objection to your proposal to change the reporting period of the monthly operations report to include a full calendar month in each report, instead of closing out on the twenty-fifth of each month as has been the practice to date." Here again that is offered merely to show the exercise of controls by the Commission over the contractor.

Mr. Rosenberg: No objection.

The Court: It may be admitted.

(Letter of August 22, 1946 from Clarke to Milton admitted in evidence and marked Plaintiff's Exhibit No. 19.)

[fol. 147] T. M. Jenner, being a witness called on behalf of Defendant, after having first been duly sworn, testified as follows:

Direct examination.

By Mr. Rosenberg:

Q. Will you please state your name and address to the Court?

A. T. M. Jenner, Olympia.

Q. What is your occupation, Mr. Jenner?

A. Tax Commissioner of the State of Washington.

Q. How long have you held that position?

A. A little over sixteen years.

Q. That has been continuously, has it not?

A. Yes, sir.

Q. During that time you have served as chairman of the Tax Commission, have you not?

A. I did for four years, yes, sir.

Q. And you have been a member of the Commission during the full life of the revenue act of 1935 then, have you not?

A. That is correct, also the revenue act of business and occupation tax of 1933.

Q. Chapter 191?

A. Chapter 191, the laws of 1933.

Q. Will you explain to the Court the organization of the Tax Commission, the number of members?

A. There are three members of the Tax Commission and in our work there we have divided up the various duties so that one commissioner will lead along a certain line and the other commissioners, other lines. My main work has been in connection with the various excise taxes [fol. 148] rather than the property taxes and particularly with the business and occupation tax of the '33 law and that of the '35 law.

Q. That has been your particular function since the time of the enactment of the law, has it not?

A. That is correct.

Q. And during all the time that title II was in the revenue act of 1935 as has been amended?

A. Yes, sir.

Q. Title II is the business and occupation tax?

A. It is.

Q. And that is the law that is here in issue?

A. Yes, sir.

Q. Now, you have had some other experience in tax work in addition to your work on the Commission, have you not?

A. Well, generally, yes. I have had knowledge of taxes. I spent many years in the title business and I was quite familiar with the property taxes before I came on the

Commission. That was at the time when we had no State excises of any moment.

Q. You have been a member of the National Association of Tax Administrators for some years?

A. Yes, since about 1937.

Q. Have you been active in the organization?

A. Yes, I have been quite active in attending the annual conference and have been president of the National Organization of Tax Administrators and am now on the board of directors of the National Associaiton of Tax Administrators which is an organization composed of the State Tax Administrators of all of the States of the United [fol. 149] States.

Q. Would you briefly explain to the Court just how that organization functions?

A. Well, it functions through a secretariat at Chicago. We have an office in Chicago. As a matter of fact it is a branch of an association known as the Federation of Tax Administrators. Under the Federation various types of taxes such as the Federation of Assessing Officers, those engaged in administering gasoline taxes and tobacco taxes are all separate units. The one I have been active in is the Tax Administrators themselves. Our primary problem has always been in these excise taxes.

Q. In the discussions of the organization you deal with mutual problems relating to the administration of the various revenue acts of the states?

A. Yes, sir, that is one of the primary functions of the organization, to acquaint each other with their problems and the solution of the problems.

Q. Have you served as a member of the board of the parent organization?

A. Yes, sir.

Q. During the course of your service, were you not a member of a special committee of several of the organizations?

A. I was a member of the committee on coordination of the Federal, State and local taxes, appointed by the Federation, or appointed by the National Association of Tax Administrators and a similar committee was appointed by

the American Bar Association and a similar committee by the National Tax Association and all were consolidated [fol. 150] into what is known as the joint committee on coordination of Federal, State and local taxes. I served on that committee for some five years.

Q. In the course of the work here at the State Tax Commission, has it been your duty to meet with members of the legislature and committees and advise and consult with them with respect to the tax laws and revenue laws?

A. Yes, sir. That is one of the statutory duties of the Tax Commission and it was a duty that was followed consistently. We prepare practically all of the tax laws and amendments in our own office in connection with the Attorney General. I presume that at every session I have appeared before the revenue committees of both the House and Senate to explain these proposed laws and amendments to existing laws.

Q. In your administration of the revenue act have questions arisen previously to these questions which are the concern of this case with respect to the tax liability of persons engaged with contracts with the Federal Government?

A. Yes, sir.

Q. And with the start of the war activity did those questions become quite numerous?

A. Yes, they became quite numerous during the so-called defense program prior to the war. Many Federal contractors were engaged in cost-plus-fixed-fee contracts.

The Court: At this time we will take a short recess.

(Whereupon a short recess was taken. Upon reconvening the following proceedings were had and testimony taken, to-wit:)

[fol. 151] By Mr. Rosenberg:

Q. Mr. Jenner, I hand you Defendant's Exhibit No. 20 and ask you to state just what it consists of?

A. One at a time?

Q. No, just generally. May I ask you this, does it not consist of a series of Tax Commission legal bulletins and

administrative rules relating to cost-plus-fixed-fee contractors with the United States?

A. Yes, sir.

Mr. Rosenberg: I believe counsel will stipulate with me this series of rulings, Defendant's Exhibit No. 20, is a series of true and correct copies of original rulings and that it may be received in evidence as evidence of the original of those rulings.

Mr. Carlson: That is correct.

The Court: It may be admitted.

(Tax Commission legal bulletins and administrative rulings above referred to admitted in evidence and marked Defendant's Exhibit No. 20.)

By Mr. Rosenberg:

Q. Now, Mr. Jenner, will you take those rulings in chronological order as they have been assembled in the exhibit and explain to the Court the circumstances surrounding their issuance and the problems involved generally and briefly?

A. Well, whenever questions of tax liability arise that are of interest to numerous taxpayers, we issue what we now [fol. 152] call administrative rulings for the benefit of our own organization, our own auditors and also for the public. All of these you will find in Prentice Hall tax reports. Later, if they are of general application and have sufficient number of taxpayers interested in them, they are incorporated in what are known as our published rules, which is published in pamphlet form every two years after the legislative session. These particular rulings, the first is of February 1, 1941, and is known as special bulletin LB number 36, the LB designating a legal bulletin although it is an official ruling of the Tax Commission and is the, this is the first ruling gotten relative to cost-plus-fixed-fee Federal contractors. At that time we hadn't had too much experience with cost-plus-fixed-fee contractors or all the legal questions relating to them had not been resolved. This was denominated "National Defense Agency contracts" and was a bulletin setting forth their tax liability based upon

the assumption they were agents of the government in performing these contracts. That bulletin, this first was of February 1, 1941. As of May 1, 1941——(interrupted).

Q. Excuse me, Mr. Jenner, before you proceed, would you explain to the Court just briefly what the status of the Business and Occupation Tax was with respect to contractors there and with reference to the legislative session which took place in 1941?

A. Prior to the legislative session of 1941 all contractors were consumers of goods used by them in the construction of buildings, or the improvement of real property generally and the retail sales tax applied to sales made to construc-[fol. 153] tion contractors. They were the consumers. They were the same as the Alabama law was at the time of the King and Boozer case which came later. At the session of 1941, the definition of what constituted a retail sale was amended and contractors engaged in improving real property were taken out of the category of a consumer, insofar as the retail sales tax was concerned and the tax was extended to define a retail sale as the improving of real property, meaning that a contractor contracting to build a house for $10,000, he then was required to collect from his principal the retail sales tax upon the full amount of his contract price. As I stated, prior to that time the contractor would pay a tax upon the materials that he used in constructing a building. That law became effective May 1, 1941.

Q. Mr. Jenner, so the Court may get the picture here under that law then when contractors performed work in improving real property of the United States, the United States became the consumer, did it not, under the '41 amendment?

A. Correct.

Q. And any sales tax would then have been charged to the United States, had it not been for the constitutional immunity?

A. That is right.

Q. But, no such sales tax was ever charged to the United States, was it?

A. Never.

Q. Nor was any amendment offered to change the law

back to fit the King and Boozer situation after the King and [fol. 154] Boozer case?

A. It was not. At that time I might state in presenting this amendment to the legislature, the revenue committees were advised that we would get no tax out of Federal construction work which the Defense program was on at that time and it looked like there would be considerable Federal construction, but it would not reduce our revenue, because theretofore we had never gotten any taxes out of the Federal government, anyway, because it was done on Federal areas where the State had no jurisdiction to tax.

Q. Will you proceed then with the ruling of——(interrupted).

A. The ruling of August 20, 1941 is a restatement of this original ruling of February 1, 1941, but rewritten primarily for the purpose of showing, or taking into account the change in our retail sales tax law whereby the contractor was no longer a consumer of goods used by him in improving real property. This was followed by a bulletin dated February 3, 1942 and there is some change made at that time and this change was made on account of the decision of the Alabama versus King and Boozer which threw considerable light upon the powers of the State tax—and that was the reason for redrafting the bulletin in 1942. A bulletin to similar effect was issued on July 21, 1942 which was known as volume 1, administrative ruling No. 5. The administrative ruling followed the legal bulletin and amounted to practically the same thing. This was a restatement of the preceding bulletin in somewhat more defined language. The effect was practically the same. I might say that vendors of contractors were quite familiar [fol. 155] with this law and they knew at that time, that is, after the amendment of 1941, that the sales tax no longer applied upon sales to contractors of materials which became a component part of a structure they were erecting, but the sales tax did apply upon any supplies which they purchased, or any tools or equipment which did not become a part of the building and where title remained in the contractor. There were, in these Federal contracts, there were a number of them at that time where the Federal government itself was acquiring tools and equipment for

the construction of buildings and taking title thereto, either directly from a vendor, but more particularly through the contractor himself and a great deal of misunderstanding arose between the contractor and his vendor as to whether or not the sales tax would apply upon consumable items he might buy such as tools, so we issued a bulletin at that time known as volume 1, administrative ruling *no.* 8. That was on February 24, 1943, which was for the benefit of vendors of contractors primarily that where the contractor purchased these consumable items, he was to make a statement upon his purchase order that the title to all materials and supplies purchased hereunder shall vest in the United States government upon the delivery to and acceptance by a representative of the government, or the contractor and then it goes on to relieve the vendors from liability for the collection of the retail sales tax. That was the object of that bulletin there.

Q. Then the rules which follow, rules 223 effective May 1, '45 and rule 223 of the present rules, effective May 1, '47 [fol. 156] are, in substance, summaries of the previously stated rulings, are they not?

A. Yes. You left one out.

Q. Excuse me.

A. These rules are all similar. These are from the published pamphlets of rulings, effective May 1, '43 and the next, May 1, '45 and the later one May 1, '47. I might state then when these rules are published, they generally are made effective May 1st of the year of issuance of the rule for the reason that is the date upon which practically all amendments to the revenue act become effective and it is the date upon which the original act became effective.

Q. Mr. Jenner, during the course of your dealings with various contractors and in the preparation of these rulings, did you have cause to consider numerous cost-plus-fixed-fee contracts with the United States government?

A. We did, yes, sir.

Q. And did you acquaint yourself with the provisions which were common to a number of them?

A. Yes, we did.

Q. Are you familiar with contracts other than those

which are the subject of this case which provide for advance payment to contractors?

A. Yes. There were other contracts of similar nature.

Q. Would you say the method of disbursing the funds and accounting for such advance funds and reimbursement for the contractors in those cases was similar to that that has been described here?

[fol. 157] A. I know nothing of the accounting, but I know the government made advance payments to certain contractors and I presume it was accounted to accomplish what was accomplished in the present suit.

Q. Did those contractors and representatives of the War and Navy Departments contend that a different taxable result should obtain with respect to advances furnished to cost-plus-fixed-fee contractors?

A. I don't recall of any government official claiming that.

Q. In those cases the business and occupation tax was applied in the same manner as cost-plus-fixed-fee contractors where no advances were furnished?

A. Yes, sir, that is correct.

Q. Now, you have heard the testimony here with respect to controls exercised by the government and Atomic Energy Commission in the case of the existing contracts, have you not?

A. Yes, sir.

Q. Were these controls substantially different from the various controls which the government retained the right to exercise in other cost-plus-fixed-fee contracts with which you were familiar?

A. Well, not materially from the casual reading of the contracts. They probably go to much greater extent of control at Hanford than they did at the Boeing plant or Seattle-Tacoma Shipbuilding Company, although similar controls were there as to the hiring and dismissal of men if the government thought it was not to the best interest of the country.

Q. Do you recall making a visit to the Seattle-Tacoma [fol. 158] Shipyard at which it was necessary to be identified before you were able to gain admission?

A. Yes, sir.

Q. And similar visits to war plant areas?

A. Yes, sir.

Q. Not connected with the instant contracts?

A. Yes, sir.

Q. Do you recall other cost-plus-fixed-fee contracts with respect to which tax was paid under title II of the revenue act as amended which provided for no fee to the contractor?

A. Yes, sir.

Q. And was the contention advanced at any time that the provision for no fee resulted——(interrupted).

By Mr. Green:

Q. What contract was that?

A. Particularly a contract entered into by the Navy with Seattle-Tacoma Shipbuilding Company for the construction of ways on Harbor Island in Seattle.

By Mr. Rosenberg:

Q. Was any question raised as to the tax liability of that cost-plus-fixed-fee contract under title II?

A. Not that I recall.

Q. The tax was paid?

A. Yes, by both the principal contractors and sub-contractors.

Q. During the course of your consideration of these various problems of tax liability under cost-plus-fixed-fee contracts did you handle the negotiations of tax liability with the contractors?

A. With many contractors we did, but after we had had some experience with local governmental authorities on it, [fol. 159] wherever these legal questions arose we later sought to have our discussions with the highest legal authority we could obtain which was generally the chief of the Tax Division of the Army and Navy.

Q. You entered into numerous discussions with those gentlemen, did you not?

A. Yes, sir.

Q. Did they not also attend the annual sessions of the National Association of Tax Administrators during the course of the war?

A. Practically always their representatives were there.

Q. And participated in the discussion of these problems with the Tax Administrators?

A. Yes, sir.

Q. Mr. Jenner, I will hand you Defendant's Exhibit No. 21 and ask you if you can explain to the Court the nature of it and circumstances under which it was received?

A. Well, this was a directive gotten out by the War Department relative to the application of the particular tax in question here and other taxes imposed by the State of Washington. It was sent to our office to O. K. or to criticize and it was issued following a conference had in the office of the State Attorney General here, I believe, in 1942, and I think it was brought about primarily by the decision in the Alabama versus King and Boozer case. At this meeting, representatives of both the judge advocates of the War and Navy Department were present; members of the Tax Commission were present and also numerous attorney generals and assistant attorney generals.

[fol. 160] Mr. Rosenberg: Mr. Green has just handed me an official copy of this directive. I think the other one has already been marked.

Mr. Green: And it may be stipulated that is an official War Department document and was distributed and bears the date April 27, 1942.

Mr. Rosenberg: I would like to move the admission of this War Department directive at this time.

The Court: It may be admitted.

(War Department directive of April 27, 1942 admitted in evidence and marked Defendant's Exhibit No. 21.)

Mr. Rosenberg: It may be stipulated for the record, may it not at this time, that the phot-static copy is an accurate copy.

Mr. Green: Oh, yes. I thought you might want the official.

By Mr. Rosenberg:

Q. Mr. Jenner, handing you Defendant's Exhibit No. 22, which is a series of letters and correspondence with Colonel E. M. Brannon. I would like you to explain to the Court

the circumstances under which that correspondence took place and the purport of it?

A. This is correspondence between Colonel Brannon, who at that time was chief of the Tax Division, Judge Advocate's office of the War Department and addressed to my attention in which followed a conference that we had had relative to the application of our occupation tax to Boeing cost-plus-fixed-fee contract. The first is a letter of [fol. 161] February 26, 1943 from the Colonel in which he set forth some proposed changes in the title clause in the then existing contract whereby materials purchased by Boeing Aircraft Company would vest in the government prior to manufacture, or assembly by the contractor; the idea being that he was trying to legally avoid the application of our occupation tax to the income that Boeing might receive for the reimbursement, Boeing might receive on materials purchased by him for incorporation in the subject of his contract.

Q. The object of the amendment proposed by Colonel Brannon was to relieve Boeing from liability under title II for retailing to the United States certain materials to be included in the finished products which it was manufacturing for the government, is it not?

A. That is correct. One of the provisions in here provided that vendors selling under, or fulfilling purchase orders of Boeing were purported to vest title directly from that vendor in the government and not to pass the title through Boeing.

Q. That would have resulted that there was his idea of a way to avoid——(interrupted).

Mr. Green: Just a minute, Your Honor please, I think that question should be withdrawn. The correspondence speaks for itself.

Mr. Rosenberg: I think that is correct. I will withdraw the question.

Q. Now, you replied to Colonel Brannon on March 11, did you not?

A. Yes, sir.

[fol. 162] Q. Will you explain?

A. I replied I didn't agree with him that that in itself

was sufficient to relieve Boeing of occupation tax measured by sales of these articles to the government and that was followed by another letter from the Colonel addressed to my attention much of the same import, also followed by my letter to him again disagreeing with his conclusions.

Q. You pointed out to him in your letter of March 30, did you not, the type of agency, or relationship which might be recognized by the Tax Commission in accomplishing the purpose which was discussed in the previous letter.

Mr. Green: Read that question again please.

(Previous question read by the reporter).

By Mr. Rosenberg:

Q. The paragraph of that letter of March 30, 1943 to which I have reference is as follows: "At the conference aforesaid, there were also present members of the staff of the Judge Advocate General of the Navy Department, including Commander Eugene Meacham. At that time, Commander Meacham submitted to this commission a copy of a revision being made in Navy contracts, which in effect, would make their cost-plus-fixed-fee contractors agents of the Navy for the purpose of purchasing materials, and specifically providing that the purchases are made by the government and that the government shall be obligated to the vendor for the purchase price of such materials, etc. In other words, under this Navy provision, the contractor becomes an agent of the government with power to pledge [fol. 163] its credit. We presumed that the Army would also adopt some amendatory provision along the lines of the Navy revision, to the effect that Army contractors would also be impowered to purchase in the name of the government and to pledge the government's credit, and the suggested statement relative to passing of title was simply for the purpose of strengthening this agency relationship."

A. That is correct.

Mr. Rosenberg: Will counsel stipulate with me that these are true and correct copies of the correspondence?

Mr. Green: Yes, and may be received by the Court in lieu of the originals.

Mr. Rosenberg: I would like to move the admission at this time of this correspondence in evidence.

The Court: It may be admitted.

(Brannon-Jenner correspondence of February and March, 1943, admitted in evidence and marked Defendant's Exhibit No. 22.)

The Court: At this time we will adjourn until one-thirty.

(Whereupon a recess was taken until one-thirty o'clock P. M. Upon reconvening at this time the following proceedings were had and testimony taken, to-wit:)

[fol. 164] By Mr. Rosenberg:

Q. Mr. Jenner, I will hand you Defendant's Exhibit No. 23 and ask you if you can identify that?

A. Yes, I have seen this exhibit. It is correspondence between the Tax Commission and principally between the Tax Commission and the du Pont Company.

Mr. Rosenberg: Will counsel stipulate with me on the record at this time that the correspondence and material contained herein is in each case true and correct copies of the originals and may be accepted, if it is accepted in evidence, in the same manner as if the originals were here admitted.

Mr. Green: It is so stipulated.

By Mr. Rosenberg:

Q. Now, Mr. Jenner, do you recall when the activities of the du Pont Company with relation to the Hanford Engineer Works first came to your attention?

A. I believe it was very early in 1943.

Q. And do you recall the nature of the conversations that you had at that time?

A. Well, I do some of them, but my first recollection is being advised that du Pont had entered, or was to enter into a contract and we had had requests from du Pont at Pasco relative to setting up a separate account for du Pont for this particular activity so as not to confuse it with other accounts we had with du Pont.

Q. Will you, Mr. Jenner, from reference to the exhibit

and the correspondence contained therein explain just exactly what happened?

[fol. 165] A. Well, briefly it was that our office, general office manager had written to du Pont advising them I had requested them to set up this account and that was to the attention of Mr. T. W. Brown, who was then the chief accounting officer and advising him that we had set up the account. That had been forwarded to Mr. Pippin at Wilmington and he had written in to, relative to that whether they had certain extensions of time to pay as they had with others. He was advised that the extension was applicable to this contract.

Q. The time that Mr. Pippin asked for that extension and made, and the arrangement was made for the separate account for this operation at Hanford, was there any contention at all that du Pont was not taxable in the operation?

Mr. Green: I object to that Your Honor please, unless it is shown what the objection was and who made it and when and where. Otherwise I think this correspondence which to my mind draws a true picture of the development of the question between du Pont and State of Washington on the one hand and Federal government and the State of Washington on the other hand reflects the situation very clearly and I don't think it would be admissable under any rule of evidence for Mr. Jenner from memory to advise this Court whether or not du Pont took this legal position or that legal position.

The Court: I think the objection is well taken.

[fol. 166] By Mr. Rosenberg:

Q. Mr. Jenner, in this correspondence that you had with Mr. Pippin, does there any place appear an objection by Mr. Pippin to the liability of the du Pont Company with respect to the contract?

A. No.

Q. Did Mr. Pippin at any of the times mentioned in this correspondence and in the correspondence, or otherwise raise any objection to the tax liability of du Pont under this contract? I am talking now about this initial correspondence, Mr. Jenner, previous to the first, second, third, fourth and fifth sheets of this exhibit?

A. No, he did not.

Q. Now, refer to the letter dated May 18, 1943.

A. Yes, sir.

Q. And then the letter of T. W. Brown of May 25th.

A. Yes, sir.

Q. The letter of the Tax Commission in reply on May 28th. The copy of the Tax Commission inter-office communication on May 28th and will you explain just what the circumstances were in regard to that correspondence?

A. The first letter of May 18, '43 is from Jess Rosenberg, or signed by Rosenberg by the Tax Commission. At that time Rosenberg was Assistant Attorney General assigned to the Tax Commission.

Mr. Green: At this point, we don't object to the inter-office communication that is from Mr. Rosenberg to the representative at Yakima. We concede its admissability against Mr. Brown and is evidence he received it. We [fol. 167] object to it for any other purpose sofar as any conclusion of law. The inter-office communication between Mr. Jenner and an associate of his in the Tax Commission.

Mr. Rosenberg: If the Court please, it is not offered to establish the validity of any of the conclusions contained therein, but to give the Court a true picture of the negotiations between the parties at the times under consideration.

Mr. Green: No objection on those grounds.

The Court: Will you have any evidence Mr. Brown advised the du Pont Company of the fact of his receipt of this communication?

Mr. Rosenberg: I think that counsel here will stipulate with me for the purpose of this record that Mr. T. W. Brown was the chief accounting officer for the du Pont Company at the Hanford project.

Mr. Green: That is correct.

The Court: You may proceed on that basis.

A. This letter of Mr. Rosenberg arose by reason of inquiry he had received from our Yakima office, which office had occasion to determine whether or not certain contractors were taxable with respect to work performed at Hanford and he enclosed a copy of the inter-office com-

munication to Mr. Brown together with a, I presume, a further inter-office communication of May 28th.

Mr. Green: May it please the Court, Plaintiffs withdraw [fol. 168] any and all objections they may have stated to that. It may be admitted for any and all purposes.

The Court: It may be admitted.

By Mr. Rosenberg:

Q. The effect of this correspondence was to——

A. The effect was to assure du Pont the retail sales tax would not apply to the purchase of materials by du Pont which were later resold to the government and to which the government took title.

By Mr. Rosenberg:

Q. In the letter of May 25, '43 from Mr. Brown to the Tax Commission, you had suggested to him certain wording be put on his purchase orders to advise his vendors that the retail sales tax was not applicable and in this letter of May 25, '43 from Mr. Brown to the Tax Commission, to your attention, he stated that our suggested wording for advice to vendors was in substance the same as they were using. Now, about that time, Mr. Jenner, or shortly thereafter, the Tax Commission had this correspondence, received this correspondence from Hoiles Mail Advertising Company, did it not?

A. That is correct.

Q. That company is a taxpayer registered with the Tax Commission, or was at that time?

A. That is correct.

Q. Will you explain to the Court just what it was that that company was trying to determine in relation to the du Pont contract?

A. This company was a mail advertising company and I [fol. 169] presume they were printing, doing some printing of some sort for du Pont, at least, they questioned the purchase order of du Pont, stating that the retail sales tax applied and it was a sale to the government whereas it looked like consumable items.

Q. They were printing this report of transfers and so

on, payroll forms for du Pont, were they not, in red ink?

A. Yes, sir, that is what they state here.

Q. That is what they were printing for du Pont?

A. They simply want to know if it was true they did not have to collect the retail sales tax. This is just one of many we receive from various vendors questioning that the sales tax did not apply upon certain of consumable items made for du Pont.

Q. They sent you the, in addition to the form they were printing, they sent you this procedure in rendering quotation form from the du Pont Company?

A. That is correct.

Q. Outlined in ink on the back of that the instructions which du Pont had given to them that the purchases were made for resale?

A. That is correct.

Q. Now, as this vendor and other vendors knew, generally, did they not, that such items are ordinarily consumable items?

A. That is right.

Q. And therefore they wondered about this?

A. That is correct.

Q. Then, on August 12th you wrote a letter to Mr. Brown on that situation. Would you explain to the Court [fol. 170] the nature of that correspondence?

A. It was a letter addressed to the du Pont Company at Pasco in which is suggested a statement—pardon me—in which we advised them we would issue a ruling to the effect that any vendor could sell anything they chose to du Pont for use in performing the contract at Hanford without collecting the retail sales tax, providing their purchase orders stated it was for that use and I had put in this letter the suggested statement and stated this: "Before issuing such a bulletin, we request that you certify to this Commission in writing that all purchases including purchases of materials, equipment and supplies of every nature, made or to be made by you pursuant to a cost-plus-fixed-fee contract with the United States for the construction of a war plant near Pasco, Washington, will be made for the purpose of resale to the United States."

Q. And you received a reply to that on August 23rd from Mr. Brown as chief accounting officer, did you not?

A. Yes, sir.

Q. And what did he state therein?

A. After his opening statement as to receipt of the letter, "The contract entered into between E. I. du Pont de Nemours and Company, and the United States Government is known as a cost-plus a fixed-fee contract. In accordance with the provisions of the contract, I certify that all purchases, including purchases of materials, equipment and supplies of every nature, made or to be made by E. I. du Pont de Nemours and Company, pursuant to a cost-plus a fixed-fee contract with the United States for the [fol. 171] construction of a war plant near Pasco, Washington, will be made for the purpose of resale to the United States."

Q. And thereafter, Mr. Jenner, on August 27, 1943 you issued an administrative ruling, volume 1-AR No. 13, did you not?

A. Yes, sir.

Q. And what was the purport of that administrative ruling?

A. The purport was to relieve all vendors of liability of collection of the retail sales tax upon any sales made to du Pont where they were properly notified it was for this contract.

Q. Will you explain to the Court how important that was to Washington vendors and why it was necessary for them to have such a ruling from the Tax Commission?

A. Well, the law provides that vendors shall collect the tax upon all retail sales and if they do not collect it, they still become personally liable for the payment of the tax to the State.

Q. That is whether they collect the tax or not?

A. That is correct.

Q. So, that had they not collected the tax, they would have assumed the liability in case of later determination the sale a taxable one?

A. That is correct. We stated: "In the event that it be hereafter determined that all or some of the purchases made by E. I. du Pont de Nemours and Company are sub-

ject to tax, the Tax Commission will collect the same directly from that company rather than from its vendors."

Q. Now, the next item in this exhibit bears the heading, [fol. 172] "Tax Commission of the State of Washington report of hearing" and bears the date October 4, 1943. Now, before we discuss with the Court that report of hearing, will you explain generally to the Court the Tax Commission's procedure in issuing these hearings?

A. Practically all these hearings of the Tax Commission are of a very informal nature. We normally and practically always make notes of what transpired, who was present and parties represented, representing the taxpayer at the hearing. These are prepared and sent to all those present and many times for the purpose of okaying our understanding of what did transpire and what we did. They are not rulings, ordinarily, of the Tax Commission. Generally I am the only tax commissioner that sits in on these hearings and these reports, after they are sent out, are submitted to the other two commissioners to keep them informed of what happened and what our ideas were, if they be expressed in the report.

Q. Now, this report bears on its face the words "Taxpayer and representatives" then the name of du Pont and Company, Hanford Project and that it appears by Lieutenant Colonel R. G. Cornell?

A. Yes, sir.

Q. Now, in what capacity did Colonel Cornell represent himself to be appearing before you?

A. Chief legal advisor of the Manhattan District Army Engineers with respect to this particular work going on there at Hanford.

Mr. Rosenberg: Now, will counsel stipulate with me on the record that Lieutenant Colonel R. G. Cornell was the [fol. 173] chief legal officer of the Manhattan District Engineer's office?

Mr. Green: Yes—chief what did you say?

Mr. Rosenberg: Chief legal officer.

Mr. Green: Just a minute before we answer that. It is so stipulated.

By Mr. Rosenberg:

Q. I call your attention now to page 2 of that report of hearing which bears the signature "Jess N. Rosenberg". Mr. Rosenberg was not a Tax Commissioner at that time was he?

A. No, sir. He was attorney for the Tax Commission, assigned to the Tax Commission by the Attorney General.

Q. Now, he makes a report of the statement of facts submitted there on page 1?

A. Yes, sir.

Q. Do you recall those and are those facts as they are stated substantially the representations made by Lieutenant Colonel Cornell at that time?

A. They are as I recall them.

Q. Would you review those please for the Court as they are stated therein?

A. You mean to read it?

Q. Yes.

A. "Statement of Facts: Subject under discussion was liability of du Pont under its cost-plus-fixed-fee contract for construction, etc., at Hanford, Washington. Among other things it was stated that the final contract between du Pont and the government has not yet been executed although the work has been in progress for some months; [fol. 174] that regardless of the cost of the project, du Pont's fixed-fee is to be but $1; that du Pont Company did not seek this contract, but was rather drafted into it; that all purchases are made by du Pont from funds furnished by the United States; that when du Pont's purchases have been approved by the government officer in charge a reimbursement is made to du Pont and du Pont in turn reimburses the advance fund which the government had originally made available. In view of these facts, the contention was advanced that du Pont was an agent of the government in making purchases under this contract, despite the statements regarding resale to the government made on the purchase order and contained in a letter by T. W. Brown to the Tax Commission. Representatives of the Tax Commission pointed out that, because of the great secrecy involved in the execution and handling of the tax-

payer's contract, it was difficult for the Commission to make accurate decisions regarding tax liability."

Q. Will you tell the Court, if you recall, just what you knew, what was known definitely by the Commission of the contract at that time?

A. Well, I knew practically nothing about it. This time Colonel Cornell had come to Olympia I had a conference with him. He had what purported to be a draft of the contract, which he stated had not yet been executed and I believe it was then he told us of certain provisions in there that might have some application to their tax liability. At that time I discussed with him whether or not du Pont was an agent of the government in executing the contract. [fol. 175] Q. But you hadn't seen the contract at that time or any of the provisions?

A. No, I had seen none.

Q. The Commission had been receiving the tax payments, however?

A. I believe so, yes, sir.

Q. Then what was the decision that was sent out to Colonel Cornell?

A. Well, at that time—first I might state that he told me at that time that du Pont did not desire to have an agency contract, that is, did not want to purchase as agent of the government and I had suggested to him a statement to be incorporated in a contract whereby he would be made an agent and would be authorized to pledge the credit of the government, I believe, on all these purchases.

Q. This is stated there as stated therein, what is termed the "decision" in the report of hearing?

A. That is correct, next to the last paragraph. That was contained in your letter. I am talking about your letter in the report of hearing. That is correct, your report of hearing, excuse me. But, that was taken from the next exhibit that I had written out for Colonel Cornell and given to him just as a memorandum for him to take back.

Q. You handed the original of that to Colonel Cornell?

A. That is correct, that is the next sheet following.

Mr. Rosenberg: Now at this point, I would like to interrupt the presentation of this exhibit and refer to the agreed statement of facts which is here in the record, Your

[fol. 176] Honor. Attached to the agreed statement of facts in the du Pont case, No. 22640 as attachment B are excerpts from various memoranda which are referred to in the statement of facts. At page 4, paragraph 19 where it is agreed that excerpts from memorandum of F. W. Bradway of negotiations between representatives of Manhattan District and the du Pont Company may be introduced in evidence and considered by the Court just as though the persons to whom the statements attributed in the memorandum were present in court. Now, if Your Honor please, these memoranda contained in the statement of facts show that Colonel Cornell actually took this proposed wording with him; that at a time previous to the execution of the final draft of the contract between the Manhattan District and the du Pont Company, the suggested provision was discussed by the representatives negotiating the contract for the du Pont Company by Army personnel; that the subject was thoroughly considered and that the decision——(interrupted).

Mr. Green: I object to that unless Mr. Jenner knows and can say that authorized persons vested with authority, jurisdiction to make decisions for the War Department or for the du Pont Company considered seriously and decided. [fol. 177] I object to the question.

Mr. Rosenberg: I haven't asked Mr. Jenner. I am explaining to the Court now. You have admitted these memoranda may come in in the agreed statement of facts. I am merely making a resume of what it shows.

Mr. Green: Excuse me, go ahead.

Mr. Rosenberg: Was finally made not to include an agency provision providing agency for the purchase of materials in this contract and I wish now to move the acceptance in evidence of those memoranda as proof those discussions did take place as stipulated.

Mr. Green: We will stipulate that the proposal emanated from Mr. Jenner; that it was made as a tax commission; that it was made to the persons to whom you state and that no such clause or provision was inserted in the contract. I will also agree that the memorandum of Mr. Bradway speaking for the du Pont Company and one of the negotiators of the contract indicates and if here would testify that

it was not included in the contract because of du Pont's unwillingness to include it in the contract.

Mr. Carlson: This stipulation should run only to the du Pont case.

Mr. Rosenberg: That is correct.

Mr. Green: That is as far as we may go.

Mr. Rosenberg: We have the correspondence we received, [fol. 178] but I think it is satisfactory as you explained it for the record. It may be understood attachment B is the exhibit and may be received in evidence.

Mr. Green: The agreed statement of facts is what I have reference to and it may be so marked for the convenience of the Court.

Mr. Rosenberg: And received in evidence.

Mr. Carlson: Are you assigning a number to that, Jess?

Mr. Rosenberg: No, but the agreed statement does carry some reservation with respect to it. That is why I raised it so it may be related to the subject of Mr. Jenner's testimony.

By Mr. Rosenberg:

Q. Do you recall the letter of October 18, 1943, Mr. Jenner?

A. Yes, sir.

Q. Would you explain to the Court just what was the purpose of that letter to Colonel Cornell?

A. The Colonel had requested I write him a letter setting forth in general the tax liability of Federal contractors which is contained in this letter and particularly with reference to this Hanford contract. There had been some changes in our law and these were called to his attention particularly as to the construction or improving of a publicly owned road. But, this letter, or with this letter I sent a number of rules, published rules of the Tax Commission all relating to the tax liability of contractors performing different types of contracts, any one of which may have been executed within that area either by the principal contractor or by sub-contractor.

[fol. 179] Q. Then refer to the letter of November 2, 1943 which Colonel Cornell sent to you that——

A. He simply acknowledged receipt of this letter and thanked me for sending it and that the matter of my letter, their tax liability of this particular company was, "The subject of several conferences with the du Pont people and while it was felt that the work had progressed too far to employ the agency arrangement, I feel that other measures will be taken which will result in material savings for the government."

Q. Right there, did Colonel Cornell in the course of your negotiations with him at any time advance the contention that du Pont Company was not subject to liability under the Washington Business and Occupation Tax?

A. Well, he may have on that original conference made some statement to that effect, but he was not familiar with our law at that time.

Mr. Green: Your Honor, I don't think that should go any further, how much he knew or anything else. No such statement as that has any place in this record. We are allowing counsel the greatest liberality in the world and he has on the witness stand a very capable and astute witness and I think they should impose upon themselves some of the rules we do not now ask the Court to impose upon them.

Mr. Rosenberg: The question is whether the legal question was raised as to the inapplicability of this tax liability by a legal officer.

[fol. 180] The Court: I think that is probably objectionable.

Mr. Green: I suggest you look at your minutes and report of hearing October 4, 1943 and read the first of the statement of facts and you will get the answer to your question.

Mr. Rosenberg: I am aware of that. If the Court please, one of the issues in this du Pont case is a procedural question as to whether there ever was a petition in writing for a hearing and correction of the tax. It is true the report of hearing, the October one sets forth the contention made by Colonel Cornell at that time. Then after the hearing this record now shows he went back and tried to get a provision included in the contract which would result in the construction which he thought would relieve the contractor of considerable liability. That was not done. Now

the question is did Colonel Cornell thereafter take a legal position that the tax was not applicable. I think then under the procedural question and the state of this record now is something the witness ought to be allowed to answer.

The Court: I can't see how any opinions Colonel Cornell might have or any views he might have expressed orally could have any effect upon the ultimate question.

Mr. Rosenberg: I am saying it is material now to know [fol. 181] whether he actually took the position that the tax did not apply. There is nothing in this record, of course, to show he did after the exchange here and correspondence with regard to the execution to the contract.

Mr. Green: May it please the Court, I think that I might at this point make clear to the Court what our position is. This matter is going to be on the question of agency. I might start out by saying that with the inception of the cost-plus-fixed-fee-contracts in the so-called defense program about the first of July, 1940 there came into play a type of contract which up to that time was entirely unknown. Prior to that time the closest approach made to that type of contract was a cost plus a percentage contract with which the government had such disastrous experiences that Congress prohibited that type of contract immediately after World War I. With the beginning of the defense program the cost-plus-a-fixed-fee type of contract was authorized by statute and that form of contract generally was the type of contract under which the defense program was carried through and the whole conduct of the war was carried through. That type of contract from the standpoint of the government was negotiated with the knowledge [fol. 182] on the part of the government it was going into the procurement field on a very vast scale; that as soon as it went into the procurement market, that prices were going to increase; that no contractor with the United States could afford to take a contract upon a fixed-price basis because of the fact that the government itself would be daily and hourly increasing his cost and so when these contracts were negotiated the representatives of selected contractors for a given project, whether it be a camp or ship or manufacturing of aeroplanes or whatnot, sat around a table with the repre-

sentatives of the war or Navy or other government agency and there was placed before them the government estimate of what the cost would be under the contract and they were told if they undertook the performance of the contract they would be paid as compensation 3% to 4.2% of the estimated cost and that that figure would remain constant notwithstanding the fact that the cost of the project might run from the basis of estimated $4,000,000 to an actual cost of $27,000,000, that fee was the same. With the operation of that contract, the states having the sales and use taxes and Washington calling them sales and compensating taxes, many questions arose. One, whether under this type [fol. 183] of contract the contractor in purchasing supplies is purchasing as the United States in substance and effect, or whether he is purchasing as an independent contractor. That question went to the Supreme Court and it was held in that case that the contractor purchased as an independent contractor and his purchases were subject to State sales taxation. In the course of the opinion the Court reverted to several features of the contract and the operations under the contract. The ones emphasized most by the Supreme Court were these. First, that the contractor did not pledge the credit of the United States toward the payment of the vendor for material sold and under that arrangement the vendor had only the contractor to look to for compensation. Another was he was not constituted an agent of the United States, couldn't pledge a credit, there was a momentary reposal in the contractor before passing title to the United States under the contract. Previously when Congress was asked to authorize the negotiation of cost-plus-fixed-fee contracts, the War Department and Navy Department and the Maritime Commission made a proposal to the House and to the Senate that the act authorizing the contracts should contain a provision authorizing the War, Navy and Maritime Com- [fol. 184] mission to constitute the contractors as agents of the United States for the purpose of performing the contract and more particularly with respect to the purchasing of equipment. The reasons given for that were that by so doing State sales and use taxes would be avoided. But, the House and Senate rejected that proposal. Then

intervened what I have outlined to the Court and we get to the point of the decision of the case and what I averted to in the course of the opinion. At that time I was in the army and I had handled the King and Boozer case for the government. After about six months within the Navy Department there arose quite a furor, that the Navy Department should include the provision that the contractor was an agent of the United States and thus eliminate the sales taxes. It was submitted to the War Department and I in my position, with others, considered that proposal. I took the position, which became the position of the War Department, a position which was known to Mr. Jenner that no executive part of the government should, or could do what Congress had expressly had the right to do and had this proposal gone to proper War Department headquarters where it could be properly considered, it would [fol. 185] have been turned down within the army. Moreover, let us go to this particular contract. I knew nothing of this contract until three days after the letter which we say here is the petition, I mean the order of the Commission and denying the petition for refund in the du Pont case. I had never seen the du Pont contract and have never seen a du Pont contract except during the past week. It was so secret I could not have seen it and I am confident Mr. Jenner had not seen it and if it be considered that we have in this documentation which has gone in here Colonel Brannon first making provision with respect to the title clauses in the contract as a means for eliminating sales and compensating taxes in the State of Washington, with that proposal Mr. Jenner has said from the stand in describing his reply he disagreed. Again the provision came back and again Mr. Jenner disagreed, but ultimately from the Tax Commission with the agreement of those in the War and Navy Departments we have another provision in the contract which provides that if it provided in the contract that the contractor buys for resale to the United States, then the Washington State sales and use tax does not apply and under that suggestion and under these contracts [fol. 186] the arrangement was completed and some millions of dollars of purchases were made, to $250,000,000 or $350,000,000 of purchases during the life of that contract

and no sales or use tax exacted. To include in that contract that the contractor is an agent of the United States is a complete negation of the necessity for the other provision. They are two negatives as viewed in the light of the other one. In addition—and I don't think that if a provision were included in the contract solely for the purpose of accomplishing a particular result as between the Tax Commission and United States on the one hand or the contractor on the other that such a provision could determine the essential determination of the contract as Your Honor will determine from the four corners of the instrument. Now, the tax result of that agency provision must be, of course, left to conjecture. We don't know. We know that the provision did not originate with the du Pont people. We know it did not originate with the others, yet at the same time we have Colonel Cornell and perhaps Pippin, I am not pretending to be accurate in that respect, representing to the Washington State Tax Commission that the du Pont Company is an agent on instrumentality and yet we have the same people being put in the [fol. 187] position, we won't put it in the contract and we are chasing a will-of-the-wisp if we tried to determine the relation between these parties and the United States by a provision drafted solely with the mind upon a tax result. That is not—we can take these war contracts and we can pick out a single clause in any one of them and constitute a great confusion on almost any question under the sun. There are provisions in these contracts which are obviously contradictory. When it comes to this operation at Hanford the government and du Pont as will General Electric, although the situation is different, will contend the nature of the operation that was being done is what gives color to this relationship, not this tax clause. I know Cornell considered it. Cornell was in the Manhattan District. I know Bradway considered it, I know Levin who was chief counsel for the Manhattan District—is that his right title? No, assistant to Cornell considered it, but that is as far as I know. But, it makes no difference whether the clause was contained in the contract or not. It has no bearing than that the State of Washington exempted this company from the payment of sales tax because there was included in the

[fol. 188] contract a title provision of a particular nature and I think we just as well explain that to the Court at the outset, because if you had been through this as Mr. Jenner has been through it—I know the Navy Department included such a provision in contracts.

Mr. Rosenberg: If the Court please, this is all argumentative.

The Court: I think counsel has the right to present argument on the admissability of evidence.

Mr. Rosenberg: If the Court please, he has already allowed this evidence in the record. He is not talking about ——(interrupted).

Mr. Green: You are seeking to place responsibility on these parties to the contract upon a single clause and until you can demonstrate Cornell was the contracting officer on this contract, then the evidence isn't admissable. I let it in, but I want to explain to the Court the error that could be committed.

Mr. Rosenberg: I think this is not the time for argument on that point.

Mr. Green: I think I would be derelict in my duty to the Court if I did not caution the Court that this is to be received with caution.

Mr. Rosenberg: If the Court please, may I answer that, because I feel that certainly if Colonel Green is to make the statement and the Court is entitled to know his views on the [fol. 189] subject, but they are a matter of argument. The evidence he is talking about is now in the record and is in there beyond any question.

Mr. Green: The Court may strike every bit of my statement out of the record. It was made for the benefit of the Court in this case.

Mr. Rosenberg: All I want to do is to explain to the Court that Colonel Green is under one or two misapprehensions. First the difference between the agency, recognition of agency provision in the contract and the administrative ruling which was actually issued which permitted Washington sellers to sell to war contractors ex-tax. There was a great distinction and that is one of the reasons why this letter from the Mail Advertising Company is in the record, just to show that difference. The agency

provision which was suggested to Colonel Cornell and which was the subject of the discussion which he presented during the negotiation of this contract was drafted, as Colonel Green pointed out, directly with the King and Boozer case in mind as the way in which the United States Supreme Court said the War Department and contractors with the War Department might achieve immunity, that is, that the immunity of the War Department would extend to these contractors if they had the authority to pledge [fol. 190] the credit of the United States and to bind the United States in their contracts. The Supreme Court found not only they did not have it, but that Congress had specifically refused to give that authority.

Mr. Green: Yes, you made the proposal that we should.

Mr. Rosenberg: Now, as tax administrators we are in this position, that we are not anxious in the State of Washington to profit from the war and from its existence, but we had a legal duty to follow the statutes of the State of Washington and one of the first things now that came up was the assertion by men like Colonel Pippen and contracting officers all up and down the line that the contractor was the agent of the government in the purchase of materials and entitled to immunity and we said if—the attempt was made to make these statements in purchase orders. That shows in Colonel Brannon's correspondence and other correspondence, that the attempt was made to draw the purchase order to the satisfaction of the local authorities that an agency relationship existed.

Mr. Green: Wait just a minute, Jess. The inclusion of the provision in the purchase order was simply to satisfy, not to satisfy what an administrator in a state would base an exemption on, he being of the mind to do so, it was [fol. 191] certainly never offered for the purpose of converting a non-agency contract to a agency contract.

Mr. Rosenberg: I will accept that, but that was one devising by which the sales tax liability of those contractors might be avoided and the administrators of the State of Washington said to the Navy and War Departments and Maritime Commission, if you will tell us in the contract you have a provision in your contract that this contractor with your governmental department is an agent of the

United States and authorized to pledge the credit of the United States, we are not going to ask any further questions. We are not going to question the authority of the departments of the United States. That is their business with Congress and we are not going to question that relationship. That is what we told Colonel Cornell. Now, it is in this record and I think it of great moment that while this contract was being made that that provision was not only suggested by the Tax Commission, but was considered by the chief legal officer of the contracting governmental department and was considered by the parties handling the negotiations, by the contractor and was rejected. Whether or not they had the power we didn't inquire in to, but that [fol. 192] was rejected and I think it is of great moment in considering then what the intentions of these contracting parties was when this Court in construing an ambiguous provision has before it the actual negotiations of the contract. That is in evidence in this record. Further, it is of great importance to this Court, because one of the theories in the complaint in each case is that the contractor here acted as an agent and therefore was not subject to tax. That is going to be a question of fact and certainly the intention of the parties in the contract as to the relationship they intended to create is of some moment. Now, let's point out the difference between that type of exemption from the State tax which the State offered to the governmental department and AR5 or other AR's saying you don't have to charge sales tax. That wasn't an exemption from sales tax. It is true the government under AR5 was enabled thereby to avoid the sales tax, but if the Court will follow Mr. Jenner this morning as to how the State of Washington amended its statutes to help the government in a way which later helped the government to avoid the King and Boozer sales tax, you will understand it. Previous to 1941 every contractor improving property [fol. 193] in this state was the consumer of materials he purchased in this state. Whether he charged the fellow he was building a building for with a sales tax or whether it was included in the price was not the business of the Commission. But, after '41 he was a vendor. Then he collected the sales tax from the party for whom he was

doing the construction. Now when that was the United States as it was under one of these contracts, the United States was exempt and paid no tax. Now, contractors who do construction work of that nature, however, do order a lot of consumable items which in no event would they sell to the United States. Such things are this red form, payroll form which the Hoiles Mail Agency printed for the du Pont Company. They printed a payroll form and they knew du Pont was the consumer of that.

Mr. Green: That becomes the property of the government.

Mr. Rosenberg: They knew in the application of the Washington State sales tax du Pont was the consumer and would be and therefore unless there was something very different about the relationship of the parties in any particular contract, the local vendor would require the sales tax to protect himself in the case of post audit. That was [fol. 194] the purpose of those rulings and later when we did audit the contractors with the War Department and Navy Department and Maritime Commission and on down the line, we did find numerous items which were consumable items and upon which the contractor himself was assessed the sales tax rather than going back and assessing the vendor.

Mr. Carlson: Supposing Mr. Jenner and the administrators wrongfully exempted somebody from tax, would the State of Washington be bound by his judgment? If Mr. Jenner made a completely wrong ruling and exempted some contractor from the payment of tax, would you say the State in an action later by the State is bound by Mr. Jenner's judgment?

Mr. Rosenberg: I will say this, that there is provision in the statute with respect to Tax Commission rulings and to the binding nature of them.

Mr. Carlson: Supposing all requirements of law were met and the thing was properly before the Court and Mr. Jenner made a wrong conclusion, would you say the State was estopped from collecting the tax?

Mr. Rosenberg: Of course, if the Court please, I don't care to carry on this argument with counsel further than to say this: it would depend on the record that might — made

in such a case and there are certain circumstances under the tax laws and the statutes under which the operations [fol. 195] under which a ruling by the Tax Commission would be final and binding upon the Tax Commission.

Mr. Carlson: I think the whole purport of Mr. Green's argument was these officers could not do what Congress and the law would not allow them to do.

Mr. Rosenberg: That is correct, Your Honor.

Mr. Green: It seems to be, if Your Honor please, we have in front of the Court for its consideration this: that Mr. Jenner or the State Tax Commission submitted to certain named parties connected with du Pont and with the Manhattan District a proposal that if a certain provision was included in the contract, the business and occupation tax would not apply. After consideration by those named the provision was not put in the contract and the Court on those facts can certainly draw any conclusion it sees fit to.

Mr. Rosenberg: That is correct, Your Honor. The evidence is in and I was only just stating my answer to Mr. Green's statements. The evidence is before Your Honor.

Mr. Green: Had these parties put in the contract the very provision that was suggested; that I had serious doubt as to whether the provision would have bound the United States, or if it had been put in, whether it was put [fol. 196] in by proper authority and that was the only cautionary point I wanted to make at the time and I tried to do that by outlining this cost-plus-fixed-fee contract.

Mr. Rosenberg: The United States Navy did include such provision in its contract and there hasn't been a decision by the Supreme Court of the United States deciding, or construing the right of any department of government to do that. Maybe they had the power and maybe they didn't. The State did not question it and I am certain Colonel Green can express his views in argument at the end of the case and in his briefs.

Mr. Green: Well, go ahead Jess.

The Court: We will take a recess at this time.

(Whereupon a short recess was taken. Upon reconvening the following proceedings were had and testimony taken, to-wit:)

By Mr. Rosenberg:

Q. Mr. Jenner, I had asked you in the last question if Colonel Cornell, as legal officer of the Manhattan District had at any time after the October 4th hearing raised to you, in writing, or otherwise, or to the Commission, an objection to the imposition of this tax with respect to the du Pont contract?

A. No, I recall no such thing.

Q. Now, the next in the file appears a notation made by you on November 12th, will you tell the Court exactly what [fol. 197] took place at that time and with respect to that notation to the meeting and conference you had on November 11th with R. R. Pippin and Mr. Riggin of the du Pont Company, stationed at Pasco, Washington and Mr. Merton Elliott, attorney for the city of Tacoma?

A. That was just a notation of a conference held with these gentlemen including Mr. Hughes of Wilmington. It was arranged by Mr. Pippin himself and happened to be on November 11th which was a holiday and we just informally sat in my office and discussed the tax liability of du Pont under this contract with no one else present.

Q. You say that conference was arranged with Mr. Pippin. How did you make the arrangement?

A. Mr. Pippin, I believe, rang me up about this, that he was going to be here on a certain date and he rang me up, I don't know whether it was that day or the day preceding, that he would be down here on the 11th.

Q. Then at that time, conference, you discussed the tax liability of the du Pont Company in regard to this contract of the Hanford Engineer Works?

A. That is right and some of the sub-contractors tax liability, particularly the Olympic Commissary Company.

Q. And then on November 23, 1943 you wrote to Mr. Pippin regarding some of the questions discussed, did you not?

A. That is correct.

Q. On the exhibit at the top you have written there "File with du Pont—Pasco job", that is your handwriting, isn't it?

A. That is.

Q. And below that there appears a notation "See report [fol. 198] hearing 7-5-44", what does that mean?

A. We made a little change in the tax liability of Olympic Commissary.

Q. That is a sub-contractor?

A. Yes, furnishing meals to employees and also hotel accom-odations which amounted to a reduction in their tax liability.

Q. But at the time, November 23rd, you wrote that letter to Mr. Pippin, did you not?

A. I did.

Q. And the letter of December 2nd on the du Pont stationery came from Pippin is reply to that letter?

A. That is right.

Q. At that time his letter indicates an agreement with your letter of November 23rd, does it?

A. It does and, of course, that letter of the 23rd was written at his request when he was here on the 11th.

Q. The next letter appearing here is one dated May 23, 1944, addressed to you from Mr. Pippin. Will you tell us about that letter?

A. Well, he had sent me a telegram he would be out here on or about June 30th and this was simply informing me of about when he expected to be here and so on; that he had talked over the tax liability with Colonel Cornell in the meantime. In any event he did get out here I believe, on July 5th instead of June 30th.

Q. In that letter, incidently Mr. Pippin does refer to Colonel Cornell as the chief legal officer of the Manhattan District of the Engineering Corps, does he not?

A. Yes, sir.

[fol. 199] Mr. Rosenberg: Now, the next document, if the Court please, is a report of hearing, so titled, dated July 5, 1944; that the Court will notice there are points four, five and six deleted by stipulation of counsel as being immaterial and I will ask counsel to stipulate with me on the record now that that is proper and that it may be received as representing a report of hearing which was actually received by the du Pont Company and the parties named in the report.

Mr. Green: It is so stipulated.

By Mr. Roesnberg:

Q. Will you tell the Court about that hearing, please?

A. Well, that was another hearing for the purpose of discussing tax liability of the contractor. At this hearing the three commissioners, Mr. McCroskey and Mr. Hedges and myself were all present, as well as Mr. Rosenberg. It was generally agreed at that time that we had correctly stated the tax liability of du Pont, though Mr. Pippin had requested that he be permitted to submit a brief on the subject, I believe it was at this hearing.

Q. And you recall what you stated to Mr. Pippin with regard to that brief?

A. Why, I recall that it was, would be perfectly agreeable to have him submit a brief and I asked him at this time if he thought he had anything further and he said he didn't then, but he might dig up something bearing on the question of whether du Pont was an agent or not and whether it was engaged in business and I believe it was [fol. 200] that time that he requested us to defer making any order until he had submitted a brief.

Q. Well, just exactly what did Mr. Pippin request?

A. I was just trying to find a statement in here.

Mr. Green: Paragraphs one and two under decisions.

A. That is right, it is number two here, "Determination of this question however, will depend upon such consideration as may be given to a brief on the question to be submitted to the Commission" and following that he did submit a brief on it and we told him we would be glad to consider the brief and let him know if we altered our opinion in any respect.

By Mr. Rosenberg:

Q. Now, did you change your mind on it?

A. No. It dragged along for awhile, the brief wasn't immediately forthcoming.

Q. When did you get it, do you recall?

A. I think it was in October following, yes, October 18th.

Q. Now, the next thing that appears in this exhibit is a letter dated, a letter by you under date of January 15, 1947?

A. Yes.

Q. Now, will you tell the Court how you happened to write that letter?

A. Yes. It was in response to a telephone call from Wilmington. It was not Mr. Pippin, as I recall. It was probably Mr. Hughes, that is immaterial I think, but it was from Wilmington stating that they could not be reimbursed for certain tax payments they had made until they had received an answer to the brief submitted by Mr. Pippin [fol. 201] and requested we immediately answer him by letter. As a matter of fact, I thought we had formerly sent him a letter prior to that time and was surprised I couldn't find it in the file, though he didn't request a reply in it. Anyhow my letter of January, '47 was in response to a telephone conversation.

Q. That the company was having this difficulty in receiving reimbursement?

A. That is correct.

Q. Now, have you at any time—oh, after the submission of this brief did the company continue to make regular bi-monthly returns in payment of taxes to the Tax Commission?

A. Yes, every bi-month.

Q. Up to and including the time the company terminated its contract?

Mr. Carlson: And after, Jess.

A. And after.

By Mr. Rosenberg:

Q. Did the company at any time make an application for refund of the amount which had been paid up to this time?

A. Up to January, 1947?

Q. Yes.

A. Or present date?

Q. No, the application for refund at the time of that hearing?

A. No, sir.

Q. Has the company ever filed a petition for refund?

A. They have filed two petitions for refund subsequent

to the filing of the present action here, but not involving [fol. 202] any payments made.

Q. What did those petitions involve?

A. They were taxes paid subsequent to February 13, I believe, 1947, minor sums they had received by reason of some reimbursement later received under their original contract.

Mr. Rosenberg: This is Defendant's Exhibit No. 24 and contains petition for refund under date March 18, 1948; reply of the Tax Commission under date of March 30th; acknowledgment of the du Pont Company on April 26th, 1948 and a letter and petition, March 10, 1949 from the du Pont Company.

Q. Handing you Defendant's Exhibit No. 24, Mr. Jenner, will you state to the Court just what these documents consist of?

A. The first is petition for refund of taxes paid between April 1, 1947 and January 28, 1948 inclusive amounting to $736.60.

Q. That letter contains a statement on page two that, "We have drafted this letter to meet the requirements of section 199", does it not?

A. Yes, sir.

Q. Does that petition relate to any of the sums which are the subject of the principal action here?

A. No, sir.

Mr. Carlson: I think we could agree at the time the cause came on for trial that the complaint would be amended to include we had paid under protest. That was my understanding.

Mr. Rosenberg: That is right.

[fol. 203] Mr. Carlson: Then I think at this point we should ask leave to amend the du Pont complaint to include these amounts.

Mr. Rosenberg: If the Court please, I think our agreement was to the effect that should the Plaintiff prevail in this case, then the hearing requested will be granted and the petitions allowed without the necessity of bringing them in this case.

Mr. Green: The Commission has entered no order on those petitions as yet.

Mr. Carlson: That may have been our understanding, but some time has expired since this complaint was filed in the du Pont case and at this time I would like to ask leave of the Court to amend the complaint to cover the very amounts that Mr. Rosenberg is now putting in evidence.

Mr. Rosenberg: We have no objection to that, Your Honor.

The Court: The complaint will be amended.

By Mr. Rosenberg:

Q. Then in answer to this letter, you wrote your reply of March 30th, did you not?

A. Yes, sir.

Q. And you received an acknowledgment then of your, the Commission's granting of a petition for hearing, did you not?

A. Yes, sir.

Q. And then the assistant comptroller of the du Pont Company stated it was his understanding that the date for [fol. 204] hearing would be fixed after final determination of the litigation pending, did he not?

A. That is correct.

Q. But we now understand that the Defendant wishes to amend its answer with respect to these?

Mr. Carlson: To which we have no objection.

The Court: It may be amended.

By Mr. Rosenberg:

Q. March 10, 1949 you received another petition for refund?

A. Yes, for $47 paid March 25, 1948-January 3, '49 inclusive.

Q. There the comptroller asked that the $47 be refunded and petition for hearing and correction, but asked the hearing be postponed pending the outcome of this litigation, did he not?

A. Yes.

Q. But counsel wishes to amend his complaint to include that amount?

Mr. Carlson: That is correct.

By Mr. Rosenberg:

Q. Am I correct in understanding then, Mr. Jenner, other than these two petitions from the du Pont Company the Commission has received no petition for hearing for the correction or refund of taxes from the du Pont Company?

A. That is correct.

Mr. Rosenberg: May it please the Court I would like to move the acceptance, admission in evidence of Defendant's Exhibit 24.

The Court: It may be admitted.

(Petitions and correspondence above referred to admitted in evidence and marked Defendant's Exhibit 24.)

[fol. 205] Mr. Rosenberg: May the record show Exhibit No. 23 was admitted, Your Honor?

The Court: Yes, if it has not been admitted it may be now admitted.

(Correspondence and Administrative rulings above referred to admitted in evidence and marked Defendant's Exhibit No. 23.)

By Mr. Rosenberg:

Q. Mr. Jenner, I will hand you Defendant's Exhibit No. 25 and ask you to tell the Court what it is?

A. Copy of an excise tax return sent in by du Pont covering tax liability incurred during September-October, 1944; typical of returns filed by du Pont.

Q. Will you explain to the Court just how the reporting is done with relation to the revenue act and the various titles thereunder in that typical return?

A. This typical return covers all titles of the revenue act. This first under which tax is imposed is title II which is under discussion in this case. They report income of $39,000,000 plus for that period on which a tax of a quarter

of 1% is computed amounting to $98,000 plus. Under title III, the retail sales tax, they report the same amount of income, $39,000,000 plus, take a deduction, however, of $39,000,000, leaving a balance of $83,447 as being a taxable amount under the retail sales tax.

Q. How do they explain that deduction, Mr. Jenner?

A. The deduction is explained on the back of the return. [fol. 206] It shows they made sales to the United States government of nearly that amount of $39,000,000 plus. In other words, all of it except $83,000 plus constituted sales to the United States government upon which the retail sales tax does not apply.

Q. In that return the corporation states that it was making sales to the United States government in a certain amount and therefore not required to collect sales tax?

A. That is correct.

Q. But did pay, however, a retail tax with respect to that amount as shown by the return?

A. It did, without any deduction, the difference being the first tax under title II as imposed is upon the seller. Title III is imposed upon the buyer.

Q. Mr. Jenner, you recall that the first correspondence in exhibit No. 23, Defendant's Exhibit No. 23 there was an arrangement made for thirty day extention?

A. Yes.

Q. Now, that return which you had in your hand was for the period September-October, 1944?

A. Yes, sir.

Q. The due date on that ordinarily would be——

A. November 15, 1944.

Q. And then with the thirty day extention?

A. Become December 15, 1944.

Q. And did the du Pont Company file these returns regularly each bi-month during the life of this contract starting with the bi-month March-April 1943?

A. Well, I am sure they did.

Mr. Rosenberg: Will counsel so stipulate?

[fol. 207] Mr. Green: We will stipulate we paid the money all right. That is why we are here.

Mr. Rosenberg: Will counsel stipulate these returns were filed?

Mr. Green: We paid the money and that is why we are here.

Mr. Rosenberg: I would like to have it stipulated for purposes of the record that each bi-month and within the time this plaintiff, the du Pont Company, filed the tax returns as required of taxpayers under the statute here and made the payments.

Mr. Carlson: That is true of each company.

Mr. Green: Yes, and it appears in the agreed statement of facts.

Mr. Rosenberg: Will counsel stipulate further that the sample which is before the Court is a sample of the form on which all those returns were made and a typical return?

Mr. Green: It is so stipulated.

Mr. Rosenberg: I move the admission in evidence of Defendant's Exhibit No. 25.

The Court: Defendant's Exhibit No. 25 may be admitted.

(Sample of excise tax return admitted in evidence and marked Defendant's Exhibit No. 25.)

By Mr. Rosenberg:

Q. Mr. Jenner, I hand you Defendant's Exhibit No. 26 which will you identify for the Court?

A. That is an official administrative ruling shown as [fol. 208] volume V-AR No. 7 issued April 26, 1948 relieving vendors of General Electric Company from all liability for the collection of the retail sales tax or the compensating tax upon the sales or, use of property sold by them to General Electric Company for use in performing this particular contract.

Q. That is a re-issue of volume III-AR9 which appears in evidence in this record on the purchase order of General Electric Company, is it not?

A. It is.

Mr. Carlson: Is that true of the last sentence, too, Mr. Jenner?

A. Oh, yes.

Mr. Rosenberg: I would like to move the admission in evidence of Defendant's Exhibit No. 26 at this time.

Mr. Carlson: No objection.
The Court: It may be admitted.

(Administrative ruling above referred to admitted in evidence and marked Defendant's Exhibit No. 26.)

Mr. Rosenberg: If the Court please, now just to make this record complete, we have here two petitions from the General Electric Company and an order of the Tax Commission of April 1, 1949 denying the petition which have not been put into the record and while I don't think they materially affect the Tax Commission's case, I think it [fol. 209] would make the record complete if they were included.

Mr. Carlson: No objection.

Mr. Rosenberg: I would like counsel to stipulate this exhibit may be withdrawn and photostatic copies be substituted, with the Court's permission.

Mr. Carlson: No objection.

The Court: It may be admitted.

Mr. Rosenberg: I move the admission then of Defendant's Exhibit No. 27. That includes two petitions and one order.

The Court: It may be admitted.

(General Electric petitions and Tax Commission order above referred to admitted in evidence and marked Defendant's Exhibit No. 27.)

Mr. Rosenberg: If the Court please, at this time I would like to ask counsel to enter into a stipulation with me on this record due to the fact of the difficulty experienced on both sides in the presentation of some of the correspondence and exhibits here in the case, that it may be stipulated that the copies received in evidence are true and correct copies in each case and that they were actually received by the parties to whom they were addressed in each case.

Mr. Green: It is so stipulated.

Mr. Rosenberg: And again to perfect this record insofar as it may be, I would like to move again for the Defendant [fol. 210] the acceptance and admission in evidence of all the exhibits submitted by the Defendant here.

Mr. Carlson: And the Plaintiffs. All exhibits are in, in other words.

Mr. Green: I suggest we stipulate also with respect to these many exhibits and to much of the testimony, that insofar as the testimony is material to both cases and the testimony and the exhibits insofar as they are material in both cases, they may be considered in each case.

Mr. Rosenberg: We will so stipulate. Thank you, Mr. Jenner, that is all.

Cross-examination.

By Mr. Green:

Q. Mr. Jenner, I believe you testified as the exhibits in this case show that you, as a member of the Tax Commission and the Commission itself became in first contact with the so-called cost-plus-fixed-fee contract used by the government in the defense program sometime in 1940, or 1941?

A. Yes, sir.

Q. It is also a fact, is it not, Mr. Jenner, that much of your time and much of your attention was devoted to consideration of tax problems arising out of those contracts from that period of time up until the very recent past, is that correct?

[fol. 211] A. Yes, sir.

Q. Now, I believe on direct examination you testified that you were familiar with the cost-plus-fixed-fee contracts generally?

A. Quite familiar with it, yes.

Q. And I believe you testified that in the case of cost-plus-fixed-fee contract the matter of control was essentially the same as came from the witness stand in this case today?

A. In some of them substantially the same from the casual reading of the contract. I think you are more secretive at Hanford than it is at Boeing.

Q. I believe that one of the controls which you mentioned in the conventional contract was the difficulty to enter into a place where a cost-plus-fixed-fee contract was in the course of performance. I believe you mentioned the Seattle-Tacoma Shipyards?

A. Yes, sir.

Q. That was a matter of exclusion, was it not?

A. Yes, sir.

Q. I believe you stated that the Navy Department Seattle-Tacoma was a pure cost contract?

A. Pure cost?

Q. Yes.

A. I think it was a cost-plus-fixed-fee contract.

Q. I believe in answer to one of Mr. Rosenberg's questions you did not know of a contract where there was a cost-plus a dollar fee?

A. The main contract of Seattle-Tacoma was the building of destroyers. They had another contract for building [fol. 212] ways for the Navy Department.

Q. Is it not a fact the one contract which you mentioned was the consideration for the other contract?

A. It probably was.

Q. Do you not know that the consideration of the destroyer contract on a cost basis was supported by Navy Department contract for the construction of ways and docks which at the termination of the contract would become the property of Seattle-Tacoma?

A. My recollection is that the ways on Harbor Island were built upon real estate belonging to Seattle-Tacoma, but that the Navy owned the ways themselves.

Q. Until the termination of the contract, or now?

A. My recollection Mr. Green, is that it remained the Navy's property. I may be mistaken.

Mr. Rosenberg: If the Court please——

By Mr. Green:

Q. I press you for this point only. I want to know if you would have the Court believe that the Seattle-Tacoma Navy contract insofar as compensation is concerned is like the two contracts involved here?

A. No, I wouldn't say their entire contract was the same as this Hanford contract.

Q. That is all I wanted to know. Do you know whether the Navy Department Seattle-Tacoma contract was furnished by government funds, constructed by government funds?

A. Whether these ways were constructed by government funds?

Q. Yes, or whether Seattle-Tacoma furnished all or a portion of the funds?

A. No, I do not know.

[fol. 213] Q. Now, upon direct examination with respect to retail sales taxes it was stated by you, I believe, that certain action of the Tax Commission relieved Boeing of the payment of taxes, having in mind the State excise tax or sales tax. Did you mean that Boeing was relieved or that the government was relieved of the payment of taxes?

A. Sales taxes you are talking about?

Q. I don't know exactly what the taxes were. Your statement was a ruling of the commission had the effect of relieving Boeing of payment of taxes?

A. I suggested a provision in a contract with Boeing would have the effect of relieving them from any tax with respect to materials that might be purchased by them as agent of the Federal Government with power to pledge the credit of the government.

Q. Now, you have mentioned an exchange of letters between yourself and Colonel Ernest M. Brannon which correspondence was considered with a letter from Colonel Brannon to you?

A. Yes, sir.

Q. And your reply to him and another letter from Colonel Brannon——

Mr. Rosenberg: You have reference to exhibit No. 22 Mr. Green?

Mr. Green: Your Honor please, I am not familiar with the way exhibits are handled here. This is it.

Q. Will you look at the letter dated February 26, 1943 from Colonel Brannon to the Washington State Tax Commission for your attention as chairman?

A. Yes.

[fol. 214] Q. And tell the Court whether in that letter there is any suggestion that the agency provision be inserted in the contract?

A. I think it had simply to do with the title of materials

that were purchased by Boeing for use in constructing articles for the government.

Q. Am I correct in my view this correspondence is limited solely to consideration of the question whether certain title provisions in the contract, if inserted in the contract would minimize or eliminate sales and use taxes?

A. Yes, I believe that is correct.

Q. This correspondence does not purport to touch on the question of business and occupation taxes, does it?

A. I believe it does.

Q. Will you indicate where it does? I am asking the question for information.

A. Yes, sir, it bears upon title II, the business tax.

Q. That is in Colonel Brannon's letter to you?

A. Yes, sir, first page, third paragraph.

Q. Was the contract so changed?

A. I don't know whether the contract was changed or not, but if it were changed as the Colonel had outlined here we would still hold them taxable under title II.

Q. And for that reason, as you say, you disagreed with Colonel Brannon?

A. Well, for the reason that the statement of, the mere statement that where title passed wouldn't necessarily, that these sales of articles purchased by Boeing for the government that title passed from the original vendors directly to the government and not through Boeing. We [fol. 215] didn't believe that was the fact, or could possibly be a fact in many, many instances at least.

Q. That is right. Do you believe that if that provision had been inserted in the contract that the provision alone would have wrought a transition in the aspects of the transaction?

A. No, I don't think so.

Q. Mr. Jenner, do you recall conversations with Lieutenant Colonel Joseph Diamond and a letter from Captain Joseph McNamara, then assistant chief of the legal branch ordinance department with respect to the Pasco operation?

Mr. Rosenberg: May I raise this objection so he may have the explanation of Mr. Green——

Mr. Green: I do that to refresh the witness's recollection

as to date. I believe that is the first time that there was any real official correspondence.

Mr. Rosenberg: Is this something to which Mr. Jenner has testified on direct?

Mr. Green: No, it is not. I will make him my own witness, if that is all right. It relates to this contract, to the du Pont contract.

Mr. Rosenberg: Just to make the cross examination orderly, before Mr. Jenner testifies to this I want to make it plain this is a subject to which he didn't testify on direct and I have that objection on cross examination.

Mr. Green: It is right in your own exhibit.

Mr. Rosenberg: I have no objection to its going in if you will relate it that way.

[fol. 216] By Mr. Green:

Q. When was the first time you ever had an official letter from the War Department with relation to the Pasco project as it was then called?

Mr. Carlson. I think your question was too fast.

By Mr. Green:

Q. When was it that you received for the first time an official communication from within the War Department having to do with the operations at the Pasco project as it was then called?

A. I don't recall. Probably a letter from Colonel Cornell was the first communication I got from anyone connected with the War Department. There may have been some earlier ones. I had many, many letters from Joseph Diamond.

Q. The point I am making, from the very beginning of this project, now called the Hanford Works, formerly the Hanford Engineer Works, this question of business and occupation tax has consumed considerable of your time, has it not?

A. Yes, sir.

Q. It has been constantly the topic of conversation between representatives of the du Pont Company and yourself?

A. Yes, sir.

Q. Representatives of the Manhattan District and yourself?

A. Yes, sir.

Q. And later representatives of the Atomic Energy Commission and yourself?

A. Yes, sir.

Q. That would approximately cover the period of the [fol. 217] entire operation from the beginning of construction up to the very recent time?

A. Yes, sir.

Q. Now, in exhibit No. 23, Mr. Jenner, Defendant's No. 23, you were shown a report of hearing dated October 4, 1943, signed by Mr. Rosenberg?

A. Yes, sir.

Q. Report of hearing before the representatives of the State of Washington Tax Commission. I will ask you to look at that and tell the Court whether or not as of that time the du Pont Company through representatives of the Manhattan Engineer, Manhattan district Engineer's office were not contending before the Tax Commission of the State of Washington that in the performance of its contract, du Pont was an agent of the United States?

A. Well, my recollection in talking to Colonel Cornell and Mr. Meier at that time the question was brought up that they were agents, that they probably did state they believed them to be agents.

Q. And at that time you made the suggestion to them which is reflected in this memorandum of yours?

A. That is correct.

Q. Dated, even date with the report of hearing and——

A. That was typed out for the Colonel while he sat there.

Q. And I note in handwriting at the bottom of that suggestion is, "Suggested to Colonel Cornell, T. M. J." Will you tell the Court whose handwriting that is?

A. That is my handwriting.

Q. And your initials?

A. Yes, sir.

[fol. 218] Q. I show you from the same exhibit, I show you a letter dated November 23, 1943, to Mr. Pippin, manager Tax Division du Pont de Nemours and Company,

Wilmington, Delaware, I ask you if you will look at the third line from the end of the first page of the letter and read that language, continuing over to the end of the second paragraph. Just read it, not aloud for the record, but just read it.

A. "Business and Occupation Tax (title II) taxable under the 'retailing' classification at rate of ¼ of 1%"——

Q. I say, don't read it into the record. I just want you to read it to yourself.

A. Oh, yes, sir.

Q. Mr. Jenner, don't you think in your judgment that that is an expression of determination on the question of whether the business and occupation tax applied on the operation of the du Pont Company at Hanford?

A. Yes, sir.

Q. I ask you to look at the top of that page and read the words written in handwriting?

A. Yes, sir.

Q. Read them into the record, if you will please?

A. "File with du Pont-Pasco job. Conclusion herein NG see report hearing 7-5-44".

Mr. Rosenberg: If the Court please, not meaning to interfere with Mr. Green's cross examination, I think I can save you some time.

Mr. Green: I know you can, but I don't want you to save me time right now.

Mr. Rosenberg: At Colonel Green's request we deleted [fol. 219] from that hearing the matters to which he is now referring.

Mr. Green: I refer only to the business and occupation tax. I am using this for the language on the top of the page.

Q. I show you Defendant's Exhibit 23 what appears as report of hearing dated July 5, 1944?

A. Yes.

Q. The hearing of July 5, 1944 which you have in your hand was, I believe, you testified the result of a telegram from Mr. Pippin?

A. Yes, sir.

Q. And to which he replied by letter dated May 23, 1944?
A. Yes, sir.

Mr. Rosenberg: If the Court please, I want to show this on the record right now. I believe we are being treated unfairly. It was at Colonel Green's request we made deletions with respect to Olympic Commissary Company while explaining in that hearing as to why the Commission made concessions to change the ruling with respect to the Olympic Commissary Company and save the government some money. If Colonel Green wants to confuse this record I think the Court should have the full context of the hearing before it. But, at the Colonel's objection we said we will not confuse this subject with a liability of contractors or any such side issue, so we will delete this to [fol. 220] accom-odate you. Now we have this attempt to tie the thing in and I think if this is going to proceed here we should amend the exhibit and put the entire report in and explain what happened.

The Court: The objection is overruled.

Mr. Green: This exhibit was introduced by the defendant. I find at the top of the page—I have in my possession report of hearing on July 5, '44 which has to do with this very cause. I simply want to tie in that date of July 5, 1944. I am approaching the meeting of July 5th.

The Court: I think you are entitled to ask the question. After the question has been asked, if there is any objection then is the proper time to make it.

By Mr. Green:

Q. I will ask you to look at the letter dated May 23, 1944?
A. Yes, sir.
Q. From Mr. Pippin to yourself which is to be found in Defendant's Exhibit, same number as the other. You will note there the date had been fixed by you for the entire day of June 30th?
A. Yes, sir.
Q. Did that hearing, did the hearing transpire on that date?
A. No, sir.
Q. It was delayed?
A. Yes, sir.

Q. And that letter, as well as your telegram were relative [fol. 221] to this hearing of July 5th?

A. Yes, sir.

Q. Now, up to that time there had been frequent conferences between yourself and Mr. Rosenberg and perhaps other members of the Commission and other representatives I have mentioned before, is that true?

A. Yes, sir.

Q. During this period most of these conversations had to do with the business and occupation tax?

A. That is correct.

Q. By that time, the sales tax question had been eliminated, had it not?

A. Yes.

Q. So there was under consideration by the Commission at the instance of the representatives of the Manhattan Engineer District and representatives of the du Pont Company the question of the applicability of the Washington Business and Occupation Tax to du Pont?

A. Yes, sir.

Q. That was the main thing before the Commission, was it not?

A. Yes, sir.

Q. You have said and I think it is a very commendable practice that the hearings before the Washington State Tax Commission are characterized by informality?

A. That is correct.

Q. It is true, however, that at the hearing of July 5, 1944, the entire Commission and its counsel, Mr. Rosenberg, were present and considered generally the arguments advanced by Mr. Pippin and was Colonel Cornell at that meeting?

[fol. 222] A. He was.

Q. And am I correct in stating that it was at the conclusion of that meeting that the Commission gave to the du Pont representatives an opportunity to file a brief on the question?

A. Yes.

Q. The opportunity was given to them to present a brief on the business and occupation tax, was it not?

A. Yes.

Q. The Olympic Commissary didn't enter into it, did it?

A. We discussed the tax liability of the Olympic Commissary at that meeting.

Q. There was no delay on the part of the brief, the brief was to be addressed on the business and occupation tax, was it not?

A. Yes. There was no question on the sales tax.

Q. Did you receive such brief?

A. Yes, sir.

Q. Was it in writing?

A. Yes, sir.

Q. Did you consider it?

A. Yes, sir.

Q. How long did you consider it?

A. Well, not very long. We read it.

Q. When did you make your formal order on it?

A. Formal order?

Q. Yes.

A. On January 15, 1947.

Q. That was——

A. Wrote a letter to Mr. Pippin.

[fol. 223] Q. That was a formal order, was it not, of the Commission?

A. No, I don't think it was a formal order of the Commission, a formal order. You will not find it in the minutes of the Commission.

Q. I ask you this question, Mr. Jenner. If there was nothing before the Tax Commission, would the Tax Commission of the State of Washington have a formal meeting attended by the three members and its counsel and write up minutes of the hearing? I asked you if the Commission considered that it had a matter before it?

A. At this July 5th meeting?

Q. Yes.

A. We certainly had a matter before it.

Q. What was the matter?

A. Tax liability of du Pont and probably some of it subcontractors.

Q. What sort of tax?

A. Business and occupation tax, title II, laws of 1935 as amended.

Q. How did the Commission dispose of it?

A. How did we dispose——(interrupted).

Q. Of the matter before it at the hearing of July 5, 1944?

A. Well, we continued to tax du Pont.

Q. It has entered no order, is that right?

A. I didn't get that.

Q. It has entered no order?

A. No.

Q. And you say that is an informal characteristic of the Tax Commission?

A. At this particular meeting——(interrupted).

[fol. 224] Q. Your disposition of it?

A. Well, ordinarily we would write that letter of January 15th about two or three days after receipt of this brief of Mr. Pippin's.

Q. Had not the Commission made up its mind before it received the brief?

A. We had made up its mind they were taxable under our law unless they could show it something to the contrary in the brief.

Q. Why not advise the taxpayer at that time instead of saying we will give you time to file the brief?

A. Simply because he requested it.

Q. That you call informality?

A. I don't know as to that. I might call it that in lieu of something else.

Q. What form does a petition in writing to the Tax Commission take under your rules?

A. It can be rather informal, in the shape of a letter addressed to the Commission. Just so the letter follows the statute.

Q. What does the statute provide?

A. That petition must be in writing, must be filed within one year after the payment is made.

Q. I take it that if it is in a series of letters and a request for a hearing made by telephone, reiterated in a letter and being encompassed in a great number of letters that it doesn't conform to the rules of the Commission?

A. We have no particular rule published at least relating to the manner in which you shall file a petition or just [fol. 225] exactly what you shall say in your petition. It

can be quite informal in wording and we will act upon it.

Q. You did consider the so-called brief?

A. Yes, sir.

Q. If you had already—and you acted upon it, did you not?

A. Well, in our own minds we acted upon it.

Q. You wrote, a letter was written to the du Pont Company advising that the business and occupation tax was held to be applicable?

A. Yes, sir.

Q. Well, if there was nothing before the Commission and I take it that if a petition in writing were not filed within one year there was nothing before the Commission, was it necessary or proper to have the hearing of July 5th?

A. The hearing of July 5th wasn't upon any petition.

Q. That, Mr. Jenner, is a matter for the Court to determine after looking at all the letters in this case.

Mr. Rosenberg: If the Court please, that is exactly what Mr. Green asked Mr. Jenner.

Mr. Green: I have the right to know what the Commission did and how it did it.

Mr. Rosenberg: Mr. Jenner's answer is that the Commission had no petition before it.

A. Even your brief wasn't filed until three months after we had the hearing.

Mr. Green: I didn't have any brief.

The Witness: Mr. Pippin's brief.

Mr. Green: I am trying to put the picture before the Court of a Commission having a formal hearing with all [fol. 226] three members present and their attorney and saying that the tax applies and I don't understand if the Commission had nothing before it why it should have had a hearing or why it should have advised to du Pont. Why wasn't it proper to write to du Pont and say you have filed no petition within one year and we have nothing to consider.

Q. I ask you the question if you think any of these letters over a period of a considerable length of time having to do with the applicability of the Washington State Busi-

ness and Occupation Tax if not in several instances alone or collectively perhaps qualify as a petition in writing within the meaning of the Washington statute as it is construed by the Washington State Tax Commission?

A. I don't think by any stretch of the imagination you could consider them a petition for refund.

Q. I said petition for hearing, which is the wording of the statute.

A. Upon a refund, for refund. We have many hearings that they just drop in on us and are just as formal or informal as this hearing we had on July 5th.

Q. Mr. Jenner, you wouldn't mean to say if I came into your office to talk to you that your Commission which is characterized by informality would characterize my conversation with you as a hearing?

A. Yes, we do, many times, if you are discussing tax liability of yourself or client.

Mr. Rosenberg: Will the reporter read Mr. Jenner's answer to make sure you got it?

(Previous answer read by the reporter.)

[fol. 227] By Mr. Green:

Q. Mr. Jenner, in reply to a question by Mr. Rosenberg who showed you a letter from Mr. Pippin in 1943, May of 1943, he asked you if at any time since Mr. Pippin advanced contention that du Pont was an agent of the United States and you said no, your answer was no. I hand you Plaintiff's exhibit No. 15, which is what we call, what you speak of as a brief, which we say is a petition and that is dated October 18, 1944, and ask you to read the last paragraph of that letter?

A. "We, therefore, submit that du Pont is an agent or instrumentality of the United States in the performance of this contract, and that the impact of the Washington Business and Occupation Tax falls on du Pont in its capacity as an instrumentality or agent of the United States and is, therefore, invalid."

Mr. Rosenberg: Mr. Green, that was the Pippin brief?

Mr. Green: Yes, dated October 18, 1944.

Mr. Carlson: I think maybe in answer to that, that was also signed by Mr. Nichols, so the record will be clear on that.

By Mr. Green:

Q. In Plaintiff's Exhibit No. 16, which is the letter of January 15, 1947, Mr. Jenner, I am sorry I can't give you anything better. I will read it to you.

A. I have it here.

Q. That is again the brief or petition alleged and in the second paragraph of the letter this is stated, "The subject matter of this brief" which is the brief submitted by Mr. Pippin, is that true?

[fol. 228] A. That is correct.

Q. Pursuant to the agreement of the hearing of July 5, 1944?

A. Yes, sir.

Q. "The subject matter of this brief was discussed by members of this Commission and of the staff of our Attorney General with representatives of du Pont and the Army, but we are unable to find that a formal answer to your brief has been made." Will you tell the Court why an answer should have been made or would have been made or why you looked for one?

A. Why, common courtesy would probably require an answer. It was through inadvertence they didn't get one.

Q. As I understand it, the brief was submitted to you?

A. Submitted to the Tax Commission.

Q. I understand a reply brief would have been handled by the Attorney General's office, the Commission doesn't write briefs, does it?

A. Well, we can.

Q. Have you ever done so and filed it in answer to a brief?

A. Yes, sir. I wrote this letter if that is in answer to a brief.

Q. So there was something before the Commission?

A. Certainly there was something before the Commission.

Q. On volume I AR 13 which both you and Mr. Rosenberg spoke of as an administrative ruling, you are familiar with that one, are you not?

A. Yes, if I would look at it I would be.

Q. It was customary to get out rulings of that nature whenever a question of general importance arose, was it not, Mr. Jenner?

[fol. 229] A. It was if it was of general interest.

Q. Now, Mr. Jenner, I show you exhibit, defendant's exhibit no. 23 and ask you to look at a letter dated October 18, 1943, from yourself to Colonel Cornell?

A. October 18th?

Q. Yes.

A. Yes, I have it.

Q. I ask you if in that letter as chairman of the Tax Commission you didn't recognize the complicated nature of the Washington business and occupation tax?

A. Yes, sir.

Q. And as late as October, 1943, the matter under discussion between representatives of the War Department, yourself and du Pont you and, of course, they, too, recognize the business and occupation tax and its application to the du Pont Company at Hanford was a complicated matter?

A. Yes, sir.

Mr. Green: That is all.

Further cross-examination.

By Mr. Carlson:

Q. Mr. Jenner, you are, of course, familiar with section 189 of the General Administrative Provisions contained in your printed pamphlets?

A. Yes, quite familiar with them.

Q. Which reads "Any money paid to the Tax Commission through error and not in payment of any tax due hereunder, upon the request of the person by whom such payment was made, shall be refunded as provided in the fore-[fol. 230] going section. Any judgment for which a recovery is granted by any court of competent jurisdiction, not appealed from, for tax, interest, penalties, and costs in a suit by any taxpayer shall be paid in like manner, upon the filing with the Tax Commission of a certified copy of the order or judgment of the Court." What is the intent of that provision?

A. Well, the intent is to permit the refund of taxes erroneously paid.

Q. Those rules were drafted by your Commission, were they not?

A. This is the law itself that you were reading, section 189. That was drafted from Professor Alfred Harsch, in 1933.

Q. Very good man. Now, Mr. Jenner, during this period you have discussed with Mr. Green, there was a good deal of informality in connection with presenting a petition to the Tax Commission, was there not?

A. Yes, sir.

Q. And particularly that was true with recognized representatives of the government, or recognized persons with positions of responsibility with private corporations?

A. That is right.

Q. And you had had dealings with the du Pont Company prior to this time and you never had to deal at arms length at any time, had you?

A. No, sir.

Q. And you placed great reliance on representatives of the du Pont Company, did you not?

A. Yes, sir.

[fol. 231] Q. And they in turn expressed the mutual confidence and reliance on your judgment and your oral statements?

A. Yes, sir.

Q. Now, prior to the time that Mr. Pippin and Colonel Cornell submitted this brief, you had had numerous meetings for the purpose of determining whether the business and occupation tax applied under this contract?

A. Yes, more particularly on how it applied.

Q. And representatives came out here from great distances for the meeting of July 5, 1944, did they not?

A. Yes, sir.

Q. Some of them 3,000 miles and the real purpose of holding that meeting was in the final analysis to determine whether the business and occupation tax did apply under the du Pont contract under suit here?

A. Yes, sir.

Q. And you were unable to reach any agreement at that meeting that was satisfactory to both parties?

A. Well, we seemed to be in agreement with all parties concerned there that spoke about the subject including Mr. Pippin.

Q. However, they asked leave to file a brief of their position that the Company was not subject to the tax?

A. That is correct.

Q. Now, Mr. Harris on my left was present at that particular meeting, was he not?

A. Yes, he was.

Q. And didn't Colonel Cornell and Mr. Pippin put up a strong argument that they were not subject to the business and occupation tax at that meeting of July 5th?

[fol. 232] A. I don't recall such, no.

Q. Would you say that wasn't true from your recollection?

A. I don't think that they put up a strong argument on it as I recall.

Q. A lengthy argument in any event was made, was it not?

A. There was considerable conversation there.

Q. How long, can you recall, Mr. Jenner, did the meeting last?

A. I don't really recall just how long that meeting did last.

Q. And you withheld your decision as a Tax Commission until you got the brief, did you not?

A. Yes, sir.

Q. And then you wrote a letter which is contained in exhibit No. 16 stating the position of the Tax Commission?

A. Yes, sir.

Q. And that was the first time the Tax Commission's position on the business and occupation tax was actually put in writing in order form?

A. I don't think that we stated our position.

Q. In writing prior to that?

A. In writing to them, but how we construed them to be taxable.

Q. Now, Mr. Jenner, I think the record should show, if you know, what taxes are actually paid to the State of

Washington over at Hanford. Are you familiar with the taxes they do pay over there?

A. No, I seldom look at the returns.

Q. Gasoline taxes are paid, are they not, that is, individual gasoline taxes?

[fol. 233] A. I wouldn't know, by individuals?

Q. Yes.

A. I assume they are paid. We do not administer the gas tax.

Mr. Rosenberg: I would have to object to that line of questioning in that it is nothing Mr. Jenner has testified to on direct. But, if he thinks it is material, he may develop it.

By Mr. Carlson:

Q. The merchants are subject to the regular retail sales tax, the stores in Richland?

A. Yes, I think they are all collecting the sales tax from the customers and remitting it.

Q. Amusement taxes are paid over there?

A. We have no amusement tax other than the occupation tax.

Q. I have in mind the theatres?

A. They pay occupation tax to the State. There may be a Company amusement tax.

Mr. Rosenberg: If the Court please, I think that counsel and I can agree, if they want a statement as to what taxes there are that other people pay over there, to complete this record I think it might be all right, but I don't think in cross examination of this witness, I don't think——

Mr. Carlson: Are you familiar with all the taxes?

Mr. Rosenberg: Not thoroughly, no.

Mr. Carlson: I think the record should show the taxes that are paid.

[fol. 234] Mr. Rosenberg: We have agreed we will agree at the close of this hearing we will supplement the record with whatever is necessary for both parties. There will be time to do this after this presentation is concluded. Is that satisfactory?

Mr Carlson: Yes.

Q. Mr. Jenner, in your administrative ruling, volume V AR 7, effective November 13, 1946, you have therein, in the last sentence the following language, "In the event it be hereafter determined that the sale or use of any property so purchased was properly subject to tax, the Tax Commission will collect the same directly from General Electric Company and not from its vendors". Why is that sentence in that administrative ruling?

A. We always put that in on those rulings and many have been out authorizing vendors to sell ex-tax and in some cases we don't know whether it is taxable or not and we don't—and we do collect considerable taxes in the shape of use taxes from buyers who had not paid the sales tax.

Q. Is it also to protect you in the case you made an erroneous ruling?

A. Well, it would protect us in the event we made an erroneous ruling. I think the State would be protected anyway.

Q. In connection with the General Electric case here did you and your Commission give consideration to the Atomic Energy Act of 1946 and the exemption contained in section 9B?

A. In denying this recent petition for refund you mean? [fol. 235] Q. Yes.

A. Yes, we gave consideration to it.

Q. And did you particularly give consideration to 9B wherein it states that, wherein it refers to activities of the Commission?

A. Yes, sir.

Q. Now, you in effect have placed a construction on that exemption clause, have you not, your Commission has?

A. Insofar as it effects the business and occupation tax, yes.

Q. Of the General Electric Company under its contract?

A. Yes, sir.

By Mr. Green:

Q. Mr. Jenner, one question. In your testimony, direct testimony making the comparison, or pointing out similar parts between cost-plus-fixed-fee contracts and cost-plus one dollar contracts as we have before us in these two cases,

and in your examination of the many cost-plus-fixed-fee contracts which passed under your eye and for consideration, did you ever before these two contracts were seen by yourself see a cost-plus-fixed-fee contract with the United States which contained a save harmless clause?

A. I recall no such provision similar to what you have in these contracts.

By Mr. Carlson:

Q. On what theory does your Commission tax reimbursements from the government to du Pont and General Electric under these contracts?

A. Under the theory that income is received, I presume. [fol. 236] That is what the statute says. Gross sales of both labor and materials.

Mr. Carlson: That is all.

Redirect examination.

By Mr. Rosenberg:

Q. Mr. Jenner, will you direct your attention again to the letter of November 23, 1943, to Mr. Pippin? It is in exhibit, defendant's exhibit No. 23?

A. Yes, sir.

Q. That letter related solely to the liability of Olympic Commissary Company, did it not?

A. That is correct.

Q. A sub-contractor of du Pont Company?

A. That is right.

Q. And it refers to business and occupation tax, title II, to which Colonel Green directed your attention, related solely to the liability of Olympic Commissary Company, did it not?

A. Yes, sir.

Q. And your note there, "Conclusion herein NG see report hearing July 5, 1944" refers to a different conclusion which you made at the time of that hearing, does it not?

A. It does.

Q. And which has been deleted from the record of that

hearing than which has been submitted in the exhibit, has it not?

A. That is right.

Q. And do your remember, now that has been gone into, do you remember why you changed your mind there with [fol. 237] respect to Olympic Commissary and why you gave them a different ruling?

A. Well, I just have the vague recollection of it. As I recall it, we were taxing both Olympic Commissary and du Pont on certain income received which was truly Olympic's, I believe.

Q. Olympic was engaged in a selling business, was it not?

A. That is correct, primarily in selling, operating a restaurant.

Q. And then it was reimbursed by du Pont?

A. Yes, sir.

Q. Then du Pont was selling and reimbursed by the government?

A. That is right.

Q. So we had the liability repeating itself for the same amounts?

A. Yes.

Q. Do you recall at the time of that hearing it was established that the Olympic Commissary Company operated at a loss?

A. That is right.

Q. Do you recall the concession that was made to the Company and change made in the reporting?

A. The losses were made up by payments made by du Pont to Olympic Commissary. I haven't that straight in my mind, Mr. Rosenberg.

Q. But we may say it was reported in the deleted portions of that hearing, report of July 5, 1944?

A. I know the substance of it was to reduce tax liability.

Q. It was at that time you then went back to the original letter and wrote, "Conclusion herein Ng."

A. That is right.

[fol. 238] Mr. Rosenberg: May I state to the Court in exhibit 23 we have written there, blanked out that material deleted by stipulation of counsel as being immaterial. We didn't do that voluntarily, we were requested to do that

by Colonel Green at his insistence and we saw no reason for further cluttering the record for it. I will not read them in the record, but we wanted the Court to know that NG written on the earlier letter——(interrupted).

Mr. Green: May I explain the only purpose that was used was this: that the hearing of July 5th appeared before the Court by minutes, or report of hearing signed by Mr. Rosenberg. If Your Honor will note on that page there is in handwriting there was a hearing on July 5, 1944. What is in that letter is as immaterial to this case as yesterday's earthquake, but had I found it on a piece of paper identifiable to du Pont, I would have asked Your Honor to receive it in evidence; that Mr. Jenner considered it a hearing on July 5, 1944.

Mr. Rosenberg: Will counsel concede those deletions were made at your request?

Mr. Green: For the sake of brevity, yes.

By Mr. Rosenberg:

Q. You were questioned at some length, Mr. Jenner, about the report of hearing. Will you explain to the Court—[fol. 239] I remember Mr. Green asked you if somebody just came in, just dropped in would you consider that a hearing. Would you explain to the Court just exactly what does happen in the varied situations in which these reports of hearings are drawn up and mailed out to taxpayers?

A. I thought I did explain that. We have these informal hearings, quite informal. We take these notes down of what transpired, what is the subject matter, what we were talking about, which was always somebody's tax liability and many times we would wind up with this report and make a decision right there and tell the taxpayer he was liable in our opinion and that would be the end of it, or we would take it under advisement and discuss it further among ourselves, but whatever happened we would write these up if there was to be a deferred decision on them.

Q. You wouldn't take this only as a formal action, would you?

A. No, sir.

Q. You have always followed this form, have you not, when you had discussions before you?

A. Yes, sir.

Q. Does it make any difference whether you appear alone or whether the entire Commission appears?

A. Make them just the same.

Q. Does it make any difference whether those meetings are prearranged by mail or telephone or the distance people come?

A. No, sir.

Q. If I drop in with a client one day and started talking [fol. 240] tax liability and it concerned a subject on which the Commission was going to make a decision, would you wind it up in the same manner?

A. If we were going to let you know later what our decision was.

Q. Now, that hearing on July 5th was postponed after an interchange of wires between you and Mr. Pippin, was it not?

A. The original date prior to July 5th had been postponed.

Q. It was postponed from an earlier date?

A. That is right. He originally wanted a hearing on June 30th. I wired him I would hold the entire day for him, whatever time he arrived.

Q. That was on July 5, '44 you had the hearing?

A. Yes, sir.

Q. But it wasn't until October 18th you received this brief?

A. Sometime after that date.

Q. I was going to ask you in your experience as a Tax Commissioner, has the Commission ever received a petition for refund, or recognized any document as a petition for refund, informal or formal, which did not ask for a refund?

Mr. Carlson: Now, if Your Honor please, that calls for the conclusion of the witness and the ultimate decision of the very question we are presenting to Your Honor.

Mr. Rosenberg: I only asked this after the subject was gone into.

Mr. Carlson: It still calls for the conclusion of the witness, Your Honor.

[fol. 241] Mr. Rosenberg: Not was it a petition or not, but did the Commission so consider it.

The Court: I don't see what difference it makes how the Commission may have considered some petition in another matter, what difference that may make to this matter. I think the question is to be determined on its merits as to this individual case, or to whether or not there was a petition.

Mr. Rosenberg: Of course, it would be generally admissable to show the administrative policy of the Commission for whatever that is worth.

The Court: He may state what form the petition for refund would take according to the Commission's ruling, if they have such ruling.

Mr. Carlson: They haven't any, Your Honor. He so testified.

The Court: Yes, I believe that is correct.

Mr. Rosenberg: In his direct testimony he testified to what he considers a petition and you have in the record before Your Honor, what is considered a petition made by both of these plaintiffs. They know how to make a petition that conforms with this statute and the Commission recognizes it as such.

Mr. Carlson: That is a question of fact, Your Honor.

By Mr. Rosenberg:

Q. Let's refer to this brief, Mr. Jenner, does it petition for anything?

Mr. Carlson: That is a question to be drawn from the [fol. 242] four corners of the instrument.

By Mr. Rosenberg:

Q. Did it ask the Commission to do anything, Mr. Jenner?

The Court: I think the Court will have to determine that on reading the instrument.

By Mr. Rosenberg:

Q. Did it mention any sum of money, Mr. Jenner?

Mr. Carlson: There again, the instrument speaks for itself.

Mr. Green: The statute requires a petition in writing for a hearing.

Mr. Rosenberg: Let's refer to the statute, Your Honor. I think we can clear this up in very short order.

Mr. Carlson: Can't we submit to the Court that the section we have in mind is 199?

Mr. Rosenberg: On his cross examination counsel went into this at some length. It was my position originally that this brief, or whatever it is, could be construed by the Court and the Court could makes its own determination from the statute, but counsel were not content to let it rest that way. They want to cross examine as to what he thought about it.

Mr. Green: That is a misconception, Your Honor, I think. On direct examination Mr. Rosenberg asked was there a petition filed by the du Pont Company and Mr. Jenner's answer was no and it was on that subject that we asked [fol. 243] the question.

Mr. Rosenberg: The only further question I am asking, Your Honor, is whether that document in any place contains any reference to any amount which is sought to be refunded.

The Court: I think that can best be determined from a reading of the document.

Mr. Carlson: And the meetings prior thereto.

Mr. Rosenberg: I think the document itself, Your Honor, will have to stand. I think we are entitled—if it is the document itself, that is fine. We are standing on that ruling, but if counsel is going to take the stand here that it is not only the document that can be construed but some other things and some other negotiations, then I think we are entitled to have them all in.

Mr. Carlson: I think everything is before the Court that refers to this procedural question.

Mr. Rosenberg: I think that is right, Your Honor, but I think Your Honor's ruling should be your ruling without amendments from Mr. Carlson.

The Court: As to the contents of the brief, it can best be determined from the contents of the instrument itself.

By Mr. Rosenberg:

Q. Mr. Jenner, you were asked the question near the close of this cross examination about the theory under which the plaintiffs in each of these cases were taxed. They were taxed under the retail classification, were they not?

[fols. 244-249] A. Yes, sir, as engaging in business as a retailer under that law.

Q. What is the measure of the tax under that classification?

A. Gross proceeds of sales, of labor and materials.

Mr. Carlson: Right there, Mr. Rosenberg——

Q. And what is the measure of the gross proceeds of sales, what did you actually use?

Mr. Rosenberg: I was coming to that.

Q. In an ordinary cost-plus-fixed-fee contract, Mr. Jenner, how do you apply, how do you determine the gross proceeds of sale?

A. The amount of reimbursement they got, or reimbursements as the case may be. Whatever is paid to them plus their fixed fee.

Q. The only difference then between this contract and any other contract would be in the amount of the fee?

A. As far as tax liability is concerned, I would say so.

Q. Well, Mr. Jenner, you were questioned about this one dollar fee, or no fee contract which took place between the Navy and the Seattle-Tacoma Shipyards?

A. Yes, sir.

Q. So far as you know of your own knowledge, that was a single contract between the Navy and Seattle-Tacoma, was it not?

A. I am not so sure about whether it was a single contract or incorporated in their original contract.

Mr. Rosenberg: No further questions.

(Witness excused.)

[fol. 250] Judge's Certificate to foregoing transcript omitted in printing.

[fol. 251] PLAINTIFF'S EXHIBIT No. 3

Thurston County, Cause No. 22640

Date Admitted 4-12-49

Contract No. W-31-109 Eng-52

Cost-Plus-Fixed-Fee

Design, Engineering, Construction, Equipping, Training Personnel, Research, Development and Operation Contract

War Department

Contractor: General Electric Company.
Address: Schenectady, New York.

Contract for: Design, Engineering, Construction, Equipping, Training Personnel, Research, Development and Operation.

Fixed Fee: $1.00.

Estimated Cost of Architect Engineer Services: $2,753,000.00.

Estimated Cost of Construction Services: $57,147,000.00.

Estimated Cost of Training Personnel: $100,000.00.

Estimated Cost of Operation of the Plant and Process Development Facilities: $67,900,000.00.

Estimated Cost of Operation of Laboratories: $9,300,000.00.

Payment: To be made by Finance Officer, United States Army, U. S. Engineer Office, Manhattan District, Oak Ridge, Tennessee.

The equipment, services and supplies to be obtained by this instrument are authorized by, are for the purpose set forth in, and are chargeable to the following Procurement Authorities, the available balances of which are sufficient to cover the cost of the same:

212/60905 608-3222 P470-07—$49,000,000.00
217/80920 708-4400 P410-07—$88,200,000.00

This contract is negotiated and executed under the First War Powers Act, 1941, and Executive Order No. 9001.

Approved: 9 Sept., 1946.

(Signed) L. R. Groves, Major General, U. S. A.

[fol. 252]

Index

Article	Title	Page
I	Description of the Plant and Laboratory Facilities	2
II	General Statement of Work and Services	3
III	Statement of Architect-Engineer Services	5
IV	Statement of Construction Services	7
V	Training of Personnel	8
VI	Operation of the Plant and Process Development Facilities	8
VII	Operation of Laboratories	10
VIII	Changes	11
IX	Title To the Work	11
X	Workmanship and Materials	11
XI	Expert Technical Assistance	12
XII	Estimated Cost and Fixed Fee	12
XIII	Cost of the Work	14
XIV	Payments	26
XV	Advances	27
XVI	Annuity Fund	34
XVII	Records and Accounts, Inspection and Audit	36
XVIII	Drawings and Other Data	38
XIX	Special Requirements	39
XX	Termination	40
XXI	Disputes	44
XXII	Convict Labor	46
XXIII	Labor	47
XXIV	Accident Prevention	49
XXV	Notice to Government of Labor Disputes	49
XXVI	Officials Not to Benefit	50
XXVII	Covenant Against Contingent Fees	50
XXVIII	Contractor's Organization	50
XXIX	Progress Reports and Changes in Personnel	50
XXX	Loading and Unloading Railway Cars	51
XXXI	Assignment of Claims	51
XXXII	Disclosure of Information	51
XXXIII	Employment of Aliens	52
XXXIV	Responsibility of Contractor-Contingencies	53
XXXV	Employees Benefit Fund	54
XXXVI	Statutory Authorization	57
XXXVII	Patents	58
XXXVIII	Term of the Contract	60
XXXIX	Options	60
XL	Disposition of Government-Owned Property	61
XLI	Anti-Discrimination	62
XLII	Code Terms	63
XLIII	Definitions	63
XLIV	Alterations	63

[fol. 253] Cost-Plus-Fixed-Fee

Design, Engineering, Construction, Equipping, Training Personnel, Research, Development and Operation Contract

Contract No. W-31-109 Eng-52

This Contract, effective as of the 15th day of May, 1946, entered into by the United States of America (herein-

after called the "Government"), represented by the Contracting Officer executing this contract, and General Electric Company (hereinafter called the "Contractor"), a corporation organized and existing under the laws of the State of New York.

Witnesseth that:

Whereas, E. I. du Pont de Nemours and Company (hereinafter referred to as "du Pont", pursuant to the provisions of Contract No. W-7412 Eng-1 with the Government, designed, constructed and is now operating a Government-owned plant at Richland, Washington (hereinafter at times referred to as the "Hanford Engineer Works" of the "Plant", and

Whereas, the Government deems it to be necessary to the national defense that the Hanford Engineer Works be continued in operation upon the termination of the aforesaid contract with du Pont, and

Whereas, the Government believes that the Contractor, because of its broad experience in the fields of electricity, chemistry and applied physics, is best suited to take over the operation of the Hanford Engineer Works, and

Whereas, the Government desires the Contractor to engage in fundamental research and development work pertaining to atomic energy, in the Contractor's Research Laboratory and in a Government Laboratory and at Hanford Engineer Works and elsewhere, and

Whereas, the Government desires the Contractor to design, engineer and construct the aforesaid Government Laboratory and perform other design, engineering and construction services as hereinafter provided, and

Whereas, the accomplishment of the work by the Contractor under a cost-plus-a-fixed-fee contract entered into after negotiations and without advertising for proposals is authorized by law,

[fol. 254] Now, Therefore, the parties hereto do mutually agree as follows:

[fol. 255] Article II—General Statement of Work and Services

[fol. 256] 9. The Contractor is authorized to administer and renew the present leases on houses, stores and other

buildings at the Plant and to make new leases to such persons and under the terms of such agreements of lease as shall be approved by the Contracting Officer, and the Contractor is hereby appointed as agent of the Government for this purpose.

* * * * * * *

11. In carrying out the work under this contract, the Contractor shall be free, but shall not be obligated, to use any materials, supplies, and equipment of its own manufacture, or manufactured by its affiliates and/or services described in paragraph 2 d of Article XIII, upon advising the Contracting Officer in advance in those instances where the price of an order is $250 or more, as to the prices at which and the conditions upon which such services, equipment, materials or supplies (except such as are carried in the stores of the Contractor's departments) will be supplied. Such prices and conditions shall be those generally accorded other purchasers purchasing similar quantities under like conditions, and such prices may be quoted without regard to [fols. 257-258] the provisions of Article XII. In the event the Government is able to obtain any of such services, materials, supplies or equipment of equal quality and quantity at a lower price or more favorable conditions from any responsible competitive source or from its own manufacture, it may undertake to do so upon so informing the Contractor within 10 days after being advised of the Contractor's prices for such services materials, supplies and equipment; otherwise the Contractor's prices so quoted shall be deemed to be negotiated prices approved by the Contracting Officer.

[fol. 259] Article IV—Statement of Construction Services

1. When authorized in writing by the Contracting Officer the Contractor shall, in the shortest practicable time thereafter, furnish or procure the services, labor, materials, tools, machinery, equipment (including installation of the equipment not procured on an installed basis), facilities and supplies not furnished by the Government, and do all [fol. 260] things necessary for the construction and equipping of the work (including the alteration, construction of addition to, and re-equipping of the Plant) in accordance

with the approved drawings and specifications. The Government reserves the right to furnish any equipment or materials necessary for the construction or equipping of the work, provided that, in the judgment of the Contractor and the Contracting Officer, such equipment or material so to be furnished is of a suitable type and in satisfactory condition.

Article VI—Operation of the Plant and Process Development Facilities

[fol. 261] Amended by Amend. #13, Sup. Agreement No. 1, 6/25/47

7. The Government shall take delivery of the Products at the final processing buildings where the Products are prepared for shipment by the Contractor. The Government assumes all responsibility for the Products subsequent to such delivery and the Contractor shall have no obligation with respect to storage of the Products at the Plant subsequent to their delivery. Incident to such assumption of responsibility, the Government shall operate and protect the facilities for the transportation of the delivered Products to the Plant storage facilities located separate and apart from the Products recovery areas and shall operate and protect such storage facilities. The Contractor shall provide maintenance services (including hazard surveys) with respect to said transportation and storage facilities at the request of the Contracting Officer from time to time.

[fol. 262] Article VII—Operation of Laboratories

2. In carrying out the work under this Article the Contractor is authorized to and shall do all things necessary or convenient in the operating of the Laboratories and closing down of the Government Laboratory or any part thereof, including (but not limited to) the employment of all persons engaged in work hereunder (who shall be subject to the control and constitute employees of the Contractor), and the providing of all materials and supplies except such as the Government is to furnish and supply as elsewhere specifically provided in this Contract.

3. The Government expressly agrees to furnish the prin-

cipal raw materials necessary for the operation of the Laboratories and reserves the right to furnish any other materials for such operation. The Contractor shall not be obligated to utilize any materials furnished by the Government unless in the judgment of the Contractor and the Contracting Officer such material is of a suitable type and in satisfactory condition.

[fol. 263] Article IX—Title to the Work

Amended by Amend. # 3, 1/28/47

Title to all materials, tools, machinery, equipment and supplies used in construction or operation of the Plant and the Laboratories for which the Contractor shall be entitled to reimbursement under Article XIII shall vest in the Government at the F. O. B. point of shipment thereof, or at such other point or points as the Contracting Officer may designate in writing; provided that the right of final inspection and acceptance or rejection of such materials, tools, machinery, equipment and supplies at such place or places as he may designate in writing is reserved to the Contracting Officer; provided, further, that upon such final inspection the Contractor shall be given written notice of acceptance or rejection as the case may be. In the event of rejection, the Contractor shall be responsible for the removal of the rejected property within a reasonable time.

[fol. 264] Article XII—Estimated Cost and Fixed-Fee

[fol. 265] 2. In consideration of its undertakings set forth in the contract, the Contractor shall receive the following:

a. Reimbursement for costs and expenses and payment of allowances and agreed rates of compensation as provided in Article XIII.

b. A fixed-fee in the amount of One Dollar ($1.00) which constitutes complete compensation for the Contractor's services, including profit other than that included in the prices quoted pursuant to Section 11, of Article II, and referred to in paragraph 2 d of Article XIII.

[fol. 266] Article XIII—Cost of the Work

1. The Contractor shall be reimbursed in the manner hereinafter described in paragraphs 2 to 5, inclusive, for all of its costs incurred in the performance of the work, under this contract, and shall be paid in the manner hereinafter described in paragraphs 2 to 5 inclusive, by way of agreed compensation or predetermined fixed amounts or rates in lieu of such costs, to the extent that such costs or fixed compensation are claimed by the Contractor and approved by the Contracting Officer or his representative as properly allocable to the contract.

2. For purposes of payment to and accounting by the Contractor, the work to be performed under this contract is divided into four principal classifications. These classifications, and the general bases of payment therefor, are as follows:

a. Payment for all work and services performed by employees on the payroll of the Hanford Engineer Works and of the Government Laboratory (Knolls II) shall be at cost.

b. Payment for all work and services performed by employees of the Contractor's Research Laboratory (whether operated at Knolls I or in present locations, or both) shall be at cost, including a negotiated (predetermined) rate of overhead.

c. Payment for all technical and consulting work or other special services performed by employees of Departments of the Contractor other than the Research Laboratory, Hanford Engineer Works, or the Government Laboratory, except work covered by Subparagraph 2, d. of this Article, shall be at cost, including a negotiated (predetermined) rate of overhead.

d. Payment for products, materials, equipment and supplies, together with services requiring the use of facilities (such as processing, testing, analyzing, etc.) which are manufactured or furnished by employees of Departments of the Contractor other than the Contractor's Research Laboratory, Hanford Engineer Works, or the Government Laboratory, shall be at prices to be negotiated (generally in advance) by the Contracting Officer and the Contractor, it being understood that such prices will normally include a

reasonable profit to the Contractor and will be those generally accorded other purchasers purchasing similar quantities under like conditions. Such prices will include all work [fol. 267] of designing and manufacturing equipment performed by employees of Departments of the Contractor other than the Contractor's Research Laboratory, Hanford Engineer Works, or the Government Laboratory. The negotiated prices contemplated in this subparagraph d. may, in some cases, take the form of a separate cost-plus-fixed-fee contract generally similar to the Contractor's existing cost-plus-fixed-fee contracts with the Government.

3. The provisions of this Paragraph 3 shall apply only to the work and services described in subparagraph 2,a. of this Article. The cost of such work and services shall include the following:

a. All labor, materials, tools, machinery, equipment, supplies, services, utilities, power and fuel necessary for either temporary or permanent use for the benefit of the work; but with respect to materials withdrawn from the Contractor's stores, whether or not such material is of its own manufacture, the actual cost shall be deemed to be the inventory cost plus the Contractor's usual handling charges for such stores.

[fol. 268] f. Profit sharing and extra compensation to employees, separation allowances and charges under welfare and other employee relations policies of the Contractor, insofar as the same are applicable to the work performed under this contract; provided that the Government shall be chargeable therefor only insofar as the same are consistent with the general employee relations policies existing within the Contractor's organization or as they may be changed [fols. 269-270] from time to time on a company-wide basis or as they may be modified with the written approval of the Contracting Officer to coincide with previous policies of du Pont at Hanford Engineer Works or due to the extraordinary circumstances and hazards surrounding the project or are incurred pursuant to agreement made as a result of collective bargaining with representatives of the employees or are expressly authorized in writing by the Contracting Officer.

4. The provisions of this paragraph 4 shall apply only to the work and services described in subparagraphs 2 b and 2 c of this Article. The cost of such work and services shall include the following:

a. All materials and supplies (including machinery, tools, dies, patterns, molds, jigs, fixtures, gauges, instruments and equipment) acquired or produced by the Contractor for use in the performance of the work under this contract. Such materials and supplies shall include those purchased for stock and subsequently issued for contract operations, those acquired under subcontracts and purchase orders, those directly chargeable to the maintenance, repair or replacement of machinery, tools, instruments, equipment, dies, molds, jigs, gauges, patterns, fixtures, and facilities which are or which are to become the property of the Government and to be used in the performance of the work provided for under this contract, and materials and supplies directly chargeable to plant alterations or to the rearrangement of plant or facilities or to the installation or removal of equipment or plant facilities. Such materials and supplies shall also include those scrapped for any reason, and waste resulting from the contract operations. Title to such waste and scrap material shall remain in the Government with the exception, however, of all ordinary manufacturing waste and scrap such as borings, turnings short ends and pieces, punchings, skeletons and the like, (but not including scrap or waste which may result from valuable or special materials furnished by the Government), title to which shall vest in the Contractor as compensation for the cost of collecting and disposing of such material. This method of reimbursing the Contractor for the collection and disposal of waste and scrap material has been determined in advance by the Contracting Officer and agreed to by the contracting parties as representing reasonable and proper compensation for the work and such compensation does not include any element of profit nor reimbursement for any expenditures or items of cost for which reimbursement or payment is provided elsewhere in this Article. With respect to materials withdrawn from the Contractor's stores, whether or not such material is of its own manufacture, the actual cost

shall be deemed to be the inventory cost plus the Contractor's usual handling charges for such stores.

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[fol. 271] 5. The provisions of this paragraph 5 shall apply to all the work and services described in subparagraphs 2, a., 2, b., and 2, c. The Contractor shall receive payment for the following items in addition to but without duplication of the amounts payable under the provisions of paragraphs 2, 3 and 4 of this Article.

a. Expenses of procuring or endeavoring to procure personnel and expediting the production and transportation of materials, supplies and equipment, including transportation and traveling expenses incident thereto.

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g. Rental of any equipment and facilities owned by the Contractor and leased to the Government for use under this contract at rates to be agreed upon by the contracting parties.

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[fol. 272] k. Premiums on such bonds and insurance policies as the Contracting Officer may approve or require as reasonably necessary for the protection of the Government or the Contractor, including the cost of any bonds required for protection of the Government in connection with advances made under Article XV. In every instance where this contract requires or permits the United States to pay the premium on a bond or insurance policy, either directly or ultimately as a reimbursable item, the bond or insurance policy shall contain an indorsement or other recital excluding by appropriate language any claim on the part of the insurer or obligor to be subrogated, on payment of a loss or otherwise, to any claim against the United States. It is recognized that complete insurance coverage may not be [fols. 273-276] readily obtainable for this project at acceptable rates. The Contracting Officer will make every effort, therefore, to effect an arrangement with the Contractor or

to enable the Contractor to effect an arrangement with a reputable insurance carrier or carriers (including the Department of Labor and Industries of the State of Washington) to the end and for the purpose that mutually satisfactory coverage of the following obligations, but without limitation to these types, may be provided for by the Contractor: Workmen's Compensation, Occupational Disease, Employer's Liability, and Comprehensive Public Liability for bodily injury and property damage.

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m. Taxes and assessments which the Contractor may be required to pay on account of this contract, including but not limited to, all property, sales, excise, use, import or export taxes, duties or imposts which the Contractor is required to pay on or for any land site, plant, laboratory, equipment, process, organization, materials, supplies, or personnel or on moneys received as reimbursement therefor.

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[fol. 277] General

9. *Reservation by Government.*

a. The Government reserves the right to furnish any materials, construction equipment, machinery, tools, or services (except personal services), including communication services necessary for the completion of the work; provided that the Contractor shall not be obligated to use any of such items unless in the judgment of the Contractor and the Contracting Officer they are of suitable type and in satisfactory condition. The Contractor shall use reasonable care with respect to such property. Upon the completion of the work at the Plant or Government Laboratory or upon demand prior thereto, the Contractor shall return such equipment, machinery, tools, and unused materials to the place designated by the Contracting Officer. The Contractor shall, as required by the Contracting Officer, cause all equipment, machinery and tools to which title is vested in the Government to be suitably marked with an identifying mark or symbol indicating that such items are the property of the United States.

b. The Government reserves the right to pay directly to common carriers any or all freight charges on construction plant, materials, and supplies.

c. The Government reserves the right to pay directly to the person concerned all sums due from the Contractor for labor, material, or other charges.

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[fol. 278] Article XIV—Payments

1. *Reimbursement for costs and expenses.* The Government shall currently reimburse the Contractor for costs and expenses incurred in accordance with this contract, and shall currently pay the Contractor the agreed compensation and predetermined agreed fixed amounts in lieu of actual costs, upon submission to and approval by the Contracting Officer of original payrolls for labor, receipted invoices for materials, supplies, and services, or other evidence satisfactory to the Contracting Officer. Generally, reimbursement will be made weekly but may be made at more frequent intervals if conditions so warrant.

• • • • • • •

4. *Payments by Contractor.* If bills for purchase of material, supplies, services, machinery or equipment, or payrolls covering employment of laborers or mechanics incurred by the Contractor or by any subcontractor hereunder are not paid promptly by the Contractor or by any subcontractor hereunder, the Government shall have the right to pay such bills or payrolls directly.

5. *Failure of the Government to Make Payments.* In the event of failure of the Government to make any payments or advances as provided in this contract (other than by reason of normal delay in the payment of current expenditures incident to the checking by the disbursing officer of statements of such expenditures), the Contractor may suspend its performance hereunder until the full amount of any deficiency shall have been paid. The exercise of this right shall be without prejudice to any other rights or remedies of the Contractor on account of such failure by the [fol. 279] Government; and failure of the Contractor to

exercise such right shall not constitute a waiver thereof with respect to any continuing or subsequent failure on the part of the Government.

6. *Payment upon Completion of Work hereunder.* Upon completion of the work hereunder and its final acceptance in writing by the Contracting Officer, the Government shall pay to the Contractor the unpaid balance of the cost of the work to be determined under Article XIII, less any sum that may be necessary to settle any unsettled claims in connection with this contract. The Contracting Officer shall accept the completed work with reasonable promptness. The Contractor shall, if required, furnish the Government with a release of all claims which it has against the Government arising under and by virtue of this contract other than such claims, if any, as may be specifically excepted by the Contractor from the operation of the release, and other than any claims subseqeuntly found or determined to have been incurred in the performance of this contract and not known to the Contractor at the time of furnishing the foregoing release.

Article XV—Advances

1. At any time and from time to time after the execution of this contract, the Government at the request of the Contractor and subject to the approval of the Contracting Officer, or his duly authorized representative, or the person to whom authority to make advance payments has been delegated, as to the present need therefor shall advance to the Contractor, without payment of interest thereon by the Contractor, sums not to exceed thirty per cent (30%) of the estimated cost of this contract (exclusive of the Contractor's fixed fee), as it may be amended from time to time, as set forth in Article XII.

2. As a condition precedent to the making of any advance payment or payments as hereinbefore provided, the Contractor shall furnish the Government with such adequate security as the Under Secretary of War or the person to whom authority has been delegated to make advance payments shall prescribe, provided that if other security is not prescribed the terms of this contract shall be considered adequate security for such advance payments; and provided, further, that if at any time the Under Secretary of

War deems the security furnished by the Contractor inadequate, the Contractor shall furnish such additional security in the form of a surety bond or surety bonds, as shall be satisfactory to the Under Secretary of War.

3. Until all advance payments hereunder are liquidated, all funds received as advance payments under this contract, together with all funds received as reimbursements and by way of allowances and other payments for the cost of the work under Article XIII, exclusive of the Contractor's fixed [fols. 280-290] fee, shall be deposited in a special bank account or accounts at a member bank or banks of the Federal Reserve System or any "insured" bank within the meaning of the Act creating the Federal Deposit Insurance Corporation (Act of August 23, 1935; 49 Stat. 684) as amended (12 U. S. C. 264) separate from the Contractor's general or other funds. Such special bank account or accounts shall be so designated as to indicate clearly to the bank their special character and purpose, and the balance in such account or accounts shall be used by the Contractor exclusively as a revolving fund for making payments for the cost of the work as provided in Article XIII and for carrying out the other purposes of the principal contract and any amendments thereto and not for other business of the Contractor. Any balances from time to time in such special account or accounts shall at all times secure the repayment of the advances in connection with which the special account or accounts are opened, and the Government shall have a lien upon such balances to secure the repayment of such advances, which lien shall be superior to any lien of the bank or any other person upon such account or accounts by virtue of assignment to it of such contract or otherwise; provided that the bank shall be under no liability to any party hereto for the withdrawal of any funds from said special account upon checks, properly endorsed and signed by the Contractor, including checks in which the Contractor is the payee, except that after the receipt by the bank of written directions from the Contracting Officer or his duly authorized representative, the bank shall act thereon and be under no liability to any party hereto for any action taken in accordance with the said written directions. Any instructions or written directions received by the bank through the

Contracting Officer upon War Department stationery and purporting to be signed by, or by the direction of, the Contracting Officer or his duly authorized representative, shall, insofar as the rights, duties, and liabilities of the bank are concerned, be conclusively deemed to have been properly issued and filed with the bank by the Contracting Officer or his duly authorized representative.

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[fol. 291] Article XIX—Special Requirements

The Contractor hereby agrees that it will:

• • • • • • •

c. Reduce to writing, unless this provision is waived in writing by the Contracting Officer, every contract in excess of Two Thousand Dollars ($2,000) made by it for the purpose of the work hereunder, for services (except contracts for employment), materials, supplies, machinery, equipment, or for the use thereof; insert therein a provision that such contract is assignable to the Government; make all such contracts in its own name and not bind nor purport to bind the Government or the Contracting Officer thereunder. No purchase order or contract in excess of Five Thousand Dollars ($5,000), and in the case of construction in excess of Two Thousand Dollars ($2.000), shall be made or placed without the prior approval or ratification of the Contracting Officer.

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[fols. 292-293] Article XX—Termination

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[fols. 294-301] 3. d. In the event the Contractor, after diligent effort, is unable to effect a negotiated settlement as provided for in paragraphs a, b, or c of this Section 3, or in the event any such settlement is disapproved by the Contracting Officer, and the Contractor is unable, by further negotiation, to effect a settlement acceptable to the Contracting Officer, the Government shall assume and become liable for the Contractor's liability under such subcontract,

obligation, commitment or claim and the Contractor shall execute and deliver to the Government all such papers and take all such steps as the Contracting Officer may require for the purpose of fully vesting in the Government the rights and benefits of the Contractor under such subcontract, obligation, commitment or claim.

* * * * * * *

[fols. 302-309] Article XXVIII—Contractor's Organization

Upon the execution of this contract, the Contractor shall submit to the Contracting Officer a chart showing in general the executive and administrative organization, duties and personnel to be employed in connection with the work under the contract; the data so furnished shall be supplemented as additional information becomes available.

Article XXIX—Progress Reports and Changes in Personnel

1. The Contractor shall, promptly after the execution of this contract, prepare and submit to the Contracting Officer, for approval, a schedule showing the order in which the Contractor proposes to carry on the construction work, with dates on which he will start the several salient features of said work and the contemplated dates for completing the same. The schedule shall be in the form of a progress chart at suitable scale so as to indicate with symbols the percentage completed at any time. The Contractor shall correct the progress schedule at the end of each week and shall immediately deliver to the Contracting Officer three copies of the same.

* * * * * * *

[fol. 310] Article XXXVII—Patents

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[fols. 311-325] 4. The Contractor hereby grants to the Government a perpetual, royalty-free license to practice in the Plant and in the Government Laboratory, but not elsewhere, all patented inventions, secret processes, technical information and know-how of the Contractor which are incorporated in the construction or operation of the Plant and

the Government Laboratory by the Contractor. This license shall not be assignable to any transferee of the Plant and/or the Government Laboratory or any part thereof, and the Contractor reserves the privilege of asserting any and all legal rights in or to such patented inventions, secret processes, technical information and know-how against any firm or corporation; provided, however, that this Article shall not supersede or modify any existing agreements between the Contractor and the Government applying to any such inventions, processes, information or know-how.

• • • • • • •

[fol. 326] Amendment No. 3: Delete the first sentence of Article IX(page 11) and substitute the following in its place:

Title to all materials, tools, machinery, equipment and supplies used in construction or operation of the Plant and the Laboratories for which the Contractor shall be entitled to reimbursement under Article XIII shall vest in the Government at the same time and place as the title passes to the Contractor; provided that the right of final inspection and acceptance or rejection of such materials, tools, machinery, equipment and supplies at such place or places as he may [fols. 327-338] designate in writing is reserved to the Contracting Officer; provided, further, that upon such final inspection the Contractor shall be given written notice of acceptance or rejection as the case may be.

Amendment No. 4: Add to Article XXXVII (pages 58 and 59) a new subparagraph b, reading as follows:

(b) Without waiving any rights, accruing to the Government under the foregoing provisions, the Commission and the Contractor agree that all provisions of the Atomic Energy Act of 1946 relating to patents and inventions are hereby incorporated into this contract by reference. Invention reports required by said Act shall be made to the Area Engineer at Hanford Engineer Works or at the Knolls Atomic Power Laboratory in Schenectady, as the case may be, unless otherwise required by the Commission. The Con-

tractor agrees that no claim for pecuniary award under the provisions of the Act shall be asserted by the Contractor or its employees with respect to any inventions or discoveries made by the Contractor or its employees in the course of the work called for in this contract.

* * * * * * *

[fol. 339] PLAINTIFF'S EXHIBIT No. 9

Thurston County Cause No. 22640
Date Admitted 4-12-49

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, IN AND FOR THE COUNTY OF THURSTON

No. —

GENERAL ELECTRIC COMPANY, a Corporation, Plaintiff,

vs.

THE STATE OF WASHINGTON, Defendant

AGREED STATEMENT OF FACTS

It is agreed by and between the plaintiff and the defendant in the above cause, by and through their respective attorneys of record, that the following Stipulation of Facts shall be and constitute an Agreed Statement of Facts on the submission, or trial, of said cause, and that the Court shall consider the same, in so far as material, as fully and completely, as if testified to, or introduced as evidence, under the ordinary rules of evidence. Either party may introduce additional evidence on the hearing of said cause should it desire to do so.

Such Stipulation and Agreed Statement of Facts is as follows:

1. That the copy of a Contract dated May 15, 1946, between the United States of America and the plaintiff, effective May 15, 1946, and known, numbered and lettered as Contract No. W-31-109 eng-52, attached hereto as "At-

tachment A", is, with the exception of certain omissions required for security purposes, and which are not material to the issues herein, a true copy of the Contract between the plaintiff and the United States of America, which is here involved.

2. That under the above mentioned Contract, the plain- [fol. 340] plaintiff was to operate a government owned community and plant for the purpose of production of plutonium, and to design and construct such additional facilities as might be required, and that said Contract, as amended, was assumed by the Atomic Energy Commission on January 1, 1947.

3. That the Atomic Energy Commission is a wholly owned agency of the United States, created by the Atomic Energy Act of 1946.

4. That under the terms, covenants and conditions of said Contract the plaintiff is to be reimbursed for all costs of whatever nature incurred under the Contract, and to receive at the completion of the Contract a fixed fee of One Dollar ($1.00).

5. That by virtue of the terms of the Atomic Energy Act of 1946, as amended, and the Contract, all property and equipment utilized by the plaintiff in the production and construction contemplated under the Contract, title to all drawings, designs and specifications created under the Contract and complete control over the product, and all its component parts, while in process and after manufacture, vests in the Atomic Energy Commission, and patents to all processes and designs conceived or developed under the Contract are owned by the Atomic Energy Commission or are assignable to it, if the Atomic Energy Commission desires.

6. That the plaintiff prepares preliminary studies, final designs, cost estimates, supervises all construction work, makes appropriate field tests, submits progress reports, and performs all other architectural and engineering services required by the Contract, either subject to the approval or at the direction of the Atomic Energy Commission.

7. That under the Contract, plaintiff operates laboratories and production plant facilities owned by the Atomic Energy Commission.

8. That the Atomic Energy Commission reserves the [fol. 341] right to furnish any or all of the materials and equipment in accordance with the Contract.

9. That the plaintiff must obtain the prior approval or ratification of the Atomic Energy Commission for all purchases or contracts over Five Thousand Dollars ($5,000.00), (and in the case of construction over Two Thousand Dollars ($2,000.00)).

10. That the plaintiff is required to get approval of the Atomic Energy Commission before purchasing or utilizing materials, supplies, and equipment of its own manufacture, when the price is Two Hundred Fifty Dollars ($250.00), or over.

11. That the Hanford Operations Office of the Atomic Energy Commission at all times maintains constant supervision of the plaintiff's actions in the performance of the Contract.

12. That the plaintiff is subject to the administrative and technical procedures prescribed by the Atomic Energy Commission in the construction, operation and research phases of the Contract.

13. That the plaintiff pays all wages, salaries, and purchases and all other expenses of Hanford Works with funds advanced by the Atomic Energy Commission.

14. That the Atomic Energy Commission has the right to pay directly to third parties all sums due for labor, material and other charges arising from the Contract.

15. That all construction subcontracts are subject to the approval of the Atomic Energy Commission.

16. That all subcontracts for the operation, research development, and production processes require the prior approval or ratification of the Atomic Energy Commission.

17. That production schedules are prescribed by the Atomic Energy Commission.

18. That the Atomic Energy Commission holds harmless [fol. 342] and indemnifies the plaintiff for all costs and expenditures arising out of the performance of the Contract, as is set forth in Article XXXIV of the Contract.

19. That all work and services of the plaintiff under the terms of the Contract are subject in all respects to the approval of the Atomic Energy Commission.

20. That the plaintiff has paid at the times, and in the amounts, and for the periods set out, the business and occupation taxes to the Tax Commission of the State of Washington, as admitted in Paragraph 1 of defendant's Answer.

21. That in conformity with the statutes of the State of Washington, the plaintiff, in due time, filed with the Tax Commission of the State of Washington its petitions, in writing, for refund of the business and occupation taxes paid by it to the Tax Commission of the State of Washington, and that, after having conducted hearings upon the plaintiff's Petitions for Refund, the Tax Commission, on April 1, 1949, entered its Order denying the refunds petitioned for, and on April 1, 1949, the Tax Commission of the State of Washington duly notified the plaintiff of its Order denying the claimed refunds. It is further stipulated and agreed that copies of the plaintiff's Petitions for Refund and of the Order of the Tax Commission of the State of Washington denying plaintiff's Petitions for Refund, may be received in evidence in this cause in lieu of the originals thereof.

22. That printed, mimeographed or typewritten directives or instructions issued to the plaintiff by those in authority of the Atomic Energy Commission, or its predecessors, may be received in evidence and considered by the Court, to the extent that they may be relevant or material.

23. That during all of the times pertinent hereto, the [fol. 343] plaintiff was engaged in the performance of its Contract with the United States of America, described in Paragraph 1 of this Agreed Statement of Facts, in the Counties of Benton, Franklin, Yakima and Grant, all in the State of Washington, at what is known as the Hanford Works, within an area owned by the United States comprising some four hundred thousand (400,000) acres in southeastern Washington. That during all of said period the Atomic Energy Commission was authorized to, and in its discretion, and the performance of its duties could bar from this area any person or persons, including employees of the plaintiff, to which the Atomic Energy Commission objected as employees because of efficiency reasons or for causes of national security.

24. That the plaintiff is a New York Corporation, char-

tered under the laws of that State, and has paid all license fees required by law to be paid by it to the State of Washington, and is qualified to bring this action.

General Electric Company, a Corporation, by Lewis C. Carey, Howard Carothers, its Attorneys; the State of Washington, by Smith Troy, Attorney General; Max Kaminoff, Asst. Attorney General; Jess N. Rosenberg, Asst. Attorney General, its Attorneys.

PLAINTIFF'S EXHIBIT NO. 10
Thurston County Cause No. 22640
Date Admitted 4-12-49

G. E. NUCLEONICS PROJECT
GENERAL ELECTRIC COMPANY
HANFORD ENGINEER WORKS

A 1865

RICHLAND, WASH. October 5, 19 48

PAY SEVENTY-SIX THOUSAND FOUR HUNDRED FIFTY-SEVEN 52/100 DOLLARS

TO THE ORDER OF
National Carbon Co., Inc.
Morganton, North Carolina

$76,457.52

THIS CHECK IS IN FULL PAYMENT OF THE ACCOUNT STATED ON VOUCHER WHICH ACCOMPANIED IT AND THE PAYEE ACCEPTS IT AS SUCH BY INDORSEMENT

GENERAL ELECTRIC COMPANY
G. E. NUCLEONICS PROJECT
CONTRACT W-31-109 ENG-52 ACCOUNT

139042.

To CHEMICAL BANK & TRUST CO.
NEW YORK, N. Y.

UNDER POWER OF ATTORNEY
BY B. A. McGuinn
L. B. Christopher
COUNTERSIGNED

PLAINTIFF'S EXHIBIT NO. 11
Thurston County Cause No. 22640
Date Admitted 4-12-49

DATE BT 3-11-49
NUCLEONICS DEPARTMENT
GENERAL ELECTRIC COMPANY
PAY TO THE ORDER OF
W-2290-MT 313-20-9279
S17 DONALD F. DIETZ
RICHLAND, WASH.
W 413000

CHECK NUMBER
PERSONAL ENDORSEMENT

$***43.54 CENTS $**43.54

GENERAL ELECTRIC COMPANY
NUCLEONICS DEPARTMENT—CONTRACT W-31-109 ENG. 52
SALARY ACCOUNT NO. 1

To SEATTLE-FIRST NATIONAL BANK
RICHLAND OFFICE
RICHLAND, WASHINGTON

UNDER POWER OF ATTORNEY

232

PLAINTIFF'S EXHIBIT NO. 12
Thurston County Cause No. 22640
Date Admitted 4-13-49

This product is protected by patents under which General Electric Co. is licensed as a manufacturer.

DISTRIBUTION OF COPIES:
ORIG. 2nd AND 3rd. TO PURCHASING DEPT
4th TO G.E. RETAINED BY AUTHOR

GENERAL ELECTRIC COMPANY

HANFORD WORKS
PURCHASE REQUISITION

No. G 94178

DATE of REQ._____ Order No._____

BUYER Delivery Required_____

Shipment Promised_____

Deliver to_____

For Area No._____ Bldg. No._____

DATE ADMITTED
Thurston County Cause No.
PLAINTIFF'S EXHIBIT No.

ITEM NO.	DETERMINE EXACT QUANTITY AND DESCRIPTION, IF POSSIBLE, BEFORE WRITING REQUISITION QUANTITY	DESCRIPTION	UNIT PRICE	TOTAL
		PLAINTIFF'S EXHIBIT No. 12		
		Thurston County Cause No. 22640		
		DATE ADMITTED 4-13-49		

Routing _____ F. O. B. _____ Terms _____ % _____ Days _____ Days Net

CHARGES

ITEM NO.

EXTENSIONS CHECKED BY

PRICED BY

SUPPLIER SELECTED BECAUSE OF
(1) LOWEST PRICE
(2) SATISFACTORY DELIVERY
(3) BETTER QUALITY
(4) BETTER OR REQUIRED DESIGN
(5) ONLY AVAILABLE SOURCE KNOWN
(6) PRICE AGREEMENT
(7) AS PER CONTRACT
(8) NO LOWER PRICE REC'D.
(9)

Issued by _____

Approved by _____

Buyer: _____ Cost _____

DUPLICATE MARKING CO., SEATTLE, SPOKANE, PORTLAND

345-348

233

G. E. NUCLEONICS PROJECT

GENERAL ELECTRIC COMPANY
HANFORD WORKS
RICHLAND, WASHINGTON

REQUEST FOR QUOTATION

Our Inquiry No._____

Date_____

TO

.

PLEASE QUOTE YOUR LOWEST PRICES ON MATERIALS LISTED BELOW

Your attention is directed to our "Procedure for Rendering Quotations" on the reverse side hereof, which is a part of this Invitation for Bid.

SPECIAL INSTRUCTIONS:

1. To receive consideration, **your signed quotation, on your business stationery (letterhead), showing price, terms and F. O. B. point must be in our hands by** (in triplicate)
2. Address quotation to General Electric Co. at our above address to the attention of , and show our INQUIRY NUMBER.
3. Delivery wanted Please indicate your best dependable Delivery date.
4. Quotation should be based on shipments being made via
5. Quote F. O. B. State shipping point in quotation

WE RESERVE THE RIGHT TO ACCEPT ANY PART OR ALL OF YOUR PROPOSAL AT THE PRICE QUOTED.

Item No.	Quantity	Description

GENERAL ELECTRIC CO.
HANFORD WORKS

By_____

349

234

PROCEDURE IN RENDERING QUOTATIONS

The General Electric Company has entered into a contract (W-31-109 Eng-52) with the United States Government, represented by the United States Atomic Energy Commission, hereinafter called the "Commission", for the operation, maintenance and maintenance of the Hanford Works, Richland, Washington. This quotation is requested in the furtherance of the performance of the work provided for in that contract. Nothing contained herein shall be construed to bind or purport to bind the United States Government.

General Electric Company will be greatly assisted if you will adhere to the following procedure in rendering quotations and if you will advise in your quotation that you are willing to accept the clauses required by the contract referred to above, which are set forth below under the caption "Conditions". These clauses will appear in any Purchase Order which may be issued as a result of your quotation.

TERMS AND INSTRUCTIONS

1. Please have signed copies of all quotations, accompanying data, letters of transmittal, etc., on Seller's business stationery (letterhead), signed by an individual authorized to bind the Company or Corporation.

2. The quotations should adhere as nearly as possible to the form, item-listing and specifications as submitted to you. Where specifications cannot be met precisely, alternates should be cited.

3. Advise total net price and where various items are listed, calculate bid-quotation and discount figures, showing net list prices as well as net cost prices.

4. If containers are involved, Seller must state type, whether returnable or non-returnable and gross, tare and net weights. If containers are returnable, Seller must state the basis for billing and credit if returned, including container cost and disposition of freight charges.

5. Any qualifying conditions which affect the price at any time within the contemplated contract period must be stated in the quotation.

6. All quotations must include definite terms of payment.

7. Seller shall state his best dependable promises of shipment or advise that he will meet the shipping dates asked for.

8. Shipping Terms: Quote F.O.B. shipping point with transportation charges allowed to destination. (Show how you expect to ship. All rail or common carrier motor truck shipments may be made freight collect. If shipped freight collect the original commercial bill of lading showing shipper's number must be mailed to Buyer as soon as original bill-of-lading is received by the carrier.

9. Destination for shipments:
Freight (C.L. and L.C.L.): Hanford, Washington: C.M.St.P.&P.R.R. Delivery
Carloading: Richland, Washington.
Truck: Richland, Washington
Express: Richland, Washington
Parcel Post and Mail Address: Richland, Washington

10. The material to be furnished on any order resulting from this inquiry may be subject to General Electric Company or Commission expediting and inspecting and testing at the Seller's plant.

CONDITIONS

The following clauses should be accepted in all quotations and unless otherwise agreed, will appear as part of the conditions on any purchase order resulting from your quotation:

1. PAYMENT. Payment is contingent upon acceptance of material.

2. DISCOUNT. Discount period shall be calculated from the date acceptable invoice is received by the Buyer.

3. DRAFTS. Will not be honored.

4. EXTRA CHARGES. No charges of any kind, including charges for boxing or cartage, will be allowed unless specifically agreed to by Buyer in writing. Price is to cover net weight of material, unless otherwise agreed.

5. DELAYS IN DELIVERY. Seller will not be held liable for delays in delivery due to causes beyond its reasonable control. However, deliveries or deliveries hereunder due to any such cause shall not be made up by the Seller except by mutual agreement in writing.

6. TAXES. Seller agrees that any taxes imposed by law upon or on account of the within material are for its account unless otherwise agreed. This purchase is exempt from taxes to the United States Government, therefore the Washington Retail Sales Tax and the Use Tax, covering Tax are not applicable thereto. (Administrative Ruling, Excise Tax Division, Tax Commission of the State of Washington, Vol. III, AR No. 91.

7. TITLE. Title to the materials and supplies purchased hereunder shall pass to the Commission at the point of delivery to the Buyer provided that all materials and supplies purchased are subject to inspection at destination by the Commission or the Buyer, within a reasonable time, and the Buyer reserves the right to reject any material or supplies which do not meet such inspection. In the event of rejection, the Seller shall be responsible for the removal of rejected property within a reasonable time and at the Seller's expense.

8. BROKERS' FEE. As required by the United States Government the Seller shall disclose the amount of any brokerage or brokers' fee or commission which may be included, directly or indirect by in the price quoted, together with an explanation thereof.

9. LABOR. Seller warrants that in the performance of this order he will comply with the Fair Labor Standards Act of 1938 and any amendments thereto, and the Walsh-Healy Act - 41 U.S.C. Section 35, where applicable.

10. NON-DISCRIMINATION. The Seller, in performing the work covered by this order, shall not discriminate against any employee or applicant for employment because of race, creed, color or national origin.

11. ASSIGNMENT. This order is assignable to the Commission, in the event of assignment to and acceptance by the Commission, Seller agrees to look solely to the Commission for payment under this order. Seller shall not assign this order or any interest therein including proceeds nor sub-contract any portion of the work to be performed without the Buyer's prior written consent, and the Buyer shall be entitled at all times to set off any amounts owing from the Seller to the Buyer or any of its affiliated companies against any amount owing by the Buyer to the Seller under this order. (The purchase of raw materials or standard or commercial articles is not to be deemed a subcontract within the meaning of this condition).

12. OFFICIALS NOT TO BENEFIT. No member of or delegate to Congress or Resident Commissioner shall be admitted to any share or part of this order or to any benefit that may arise therefrom, but this provision shall not be construed to extend to this order if made with a corporation for its general benefit.

13. DOMESTIC ARTICLES. Seller warrants that only such unmanufactured articles, materials and supplies as have been mined or produced in the United States and only such manufactured articles, materials and supplies as have been manufactured in the United States substantially all from articles, materials or supplies mined, produced or manufactured as the case may be, in the United States shall be delivered pursuant to this order. (41 U.S.C.A. 10d).

14. INSPECTION. Buyer or the Commission shall have the privilege of expediting, inspecting and testing all materials and workmanship furnished on this order. The exercise of the right of inspection and test, however, shall in no way relieve the Seller of its obligation to furnish all materials or articles in strict accordance with the terms and provisions of the order. In case any of the articles or materials are found to be defective in material or workmanship, or otherwise not in conformity with the requirements of this order, the Buyer shall have the right to reject the same or require that such articles or materials be corrected or replaced promptly with satisfactory materials or workmanship. If inspection and test are made on the premises of the Seller, the Seller shall furnish without additional charge, all reasonable facilities and assistance for the safe and convenient inspection and tests required by the inspectors in the performance of their duty. All inspections and tests shall be performed in such a manner as not to delay the work unduly.

15. CHANGES. The Buyer shall have the right to make changes in the order, but no additional charge will be allowed unless authorized by means of a supplemental purchase order. If such change affect price, delivery or characteristics of material, the Seller should notify the Buyer immediately and negotiate an adjustment.

16. DRAWINGS. Upon completion of work by the Seller under this order, the Seller shall promptly return to the Buyer all drawings, specifications and other data or papers furnished by the Buyer in connection herewith, together with all copies or reprints then in the Seller's possession or under control, and the Seller shall thereafter make no further use either directly or indirectly of any such drawings, specifications, data or papers or of any information derived therefrom without the Buyer's prior written consent.

17. PATENTS. The Seller agrees to protect and hold the Buyer and the United States Government harmless against any and all demands and claims on account of infringements or alleged infringements of patented or alleged patented articles or inventions used on or for the work, and will at its own cost and expense, defend any and all suits which may be brought against the Seller, the Buyer and the United States Government, on account of infringements or alleged infringements and pay any and all damages, costs, and damages resulting therefrom. It is hereby agreed that all provisions of the Atomic Energy Act of 1946 relating to patents and inventions are hereby incorporated by reference.

18. DELIVERY SCHEDULE. It is the Seller's responsibility to comply with the Buyer's delivery schedule but not to unreasonably interrupt the Buyer's requirements by making material commitments and production arrangements in excess of the amount or in advance of the time necessary to meet the specified delivery schedule.

19. TERMINATION CLAUSE. The approved termination provisions stated in Paragraph 7 of Revision No. 5 of Director of Contract Settlement dated October 4, 1944, is incorporated in this purchase order by reference.

20. COMPLIANCE WITH LAWS. In the performance of the work hereunder, the Seller shall comply with all applicable State, Federal and local laws, rules and regulations.

21. FOR WORK ON BUYER'S PREMISES ONLY. If Seller's work under the order involves operations by the Seller on the Buyer's or Commission's premises, Seller shall take all necessary precautions, or such additional precautions as the Buyer may prescribe, to prevent the occurrence of any damage to person or property during the progress of such work and shall indemnify Buyer and the Commission against all loss which may result in any way from any act or omission on the part of Seller, its agents, employees or sub-contractors, except to the extent that any such damage to the property of the Commission or to the employees of the Buyer or the Commission, and Seller shall maintain such safety and disability to the employees of the Buyer or the Commission, and Seller shall maintain such Public Liability, Property Damage and Employer's Liability and Compensation insurance as will protect Buyer and the Commission from said risks and from any claims under any applicable Workmen's Compensation and Occupational Disease Acts.

22. EMPLOYMENT OF ALIENS. (Applies only to Purchase Orders involving "restricted data" within the meaning of the Atomic Energy Act)

The Seller will not permit any alien employed, or to be employed by it to have access to the classified drawings, specifications and accompanying explanatory data relating to the performance of the order, or to the classified models or material referred to therein, or to engineering principles, or to the classified processes or manufacture which are classified and relate to the functioning or use of its article or articles forming the subject matter of this order, without the written consent hereof of the Commission.

23. DISCLOSURE OF INFORMATION. (Applies only to Purchase Orders involving "restricted data" within the meaning of the Atomic Energy Act)

It is understood that disclosure of classified information relating to this order to any person not entitled to receive it, or failure to safeguard all secret, confidential and restricted data which may come to the Seller or any person under his control in connection with this order may subject the Seller, his agents, employees, and subcontractors to criminal liability under the laws of the United States. (See Title I of an Act approved June 15, 1917, 40 Stat. 217; 50 U.S.C. 31-44); as amended by an Act approved March 28, 1940 (54 Stat. 79), and the provisions of an Act approved January 12, 1938 (52 Stat. 3, 50 U.S.C. 45-45d), as supplemented by Executive Order No. 8381, dated March 22, 1940, 3 F.R. 1147, see also, generally, the Atomic Energy Act of 1946, Public Law 585 - 79th Congress. The Seller agrees to conform to all security regulations and requirements of the Atomic Energy Commission. Except as the Commission may authorize, in accordance with Section 10 (b) (3) of the Atomic Energy Act of 1946, the Seller agrees not to permit any individual to have access to restricted data until the Federal Bureau of Investigation shall have made an investigation and report to the Commission on the character, associations, and loyalty of such individual and the Commission shall have determined that permitting such person to have access to restricted data will not endanger the common defense or security. The term "restricted data" as used in this provision means all data concerning the manufacture or utilization of atomic weapons, the production of fissionable materials or the use of fissionable material in the production of power, but shall not include any data which the Commission from time to time determines may be published without adversely affecting the common defense and security.

235

HW-3.9
8-5-47

GENERAL ELECTRIC COMPANY
HANFORD ENGINEER WORKS

CONTRACT W-31-109 ENG. 52

DATE_____

RECORD OF PURCHASE No._____

REQUISITION NO. _____ ORDER NO. HW _____

MATERIAL _____

QUOTATIONS RECEIVED—NAME OF BIDDER	PRICE QUOTED		F. O. B.—TERMS	SHIPMENT PROMISED

QUOTATION ACCEPTED—NAME OF BIDDER	REASON SUPPLIER SELECTED
	☐ 1. Lowest Price.
	☐ 2. Satisfactory Delivery.
	☐ 3. Better Quality.
	☐ 4. Better or Required Design.
	☐ 5. Only Available Source Known.
AMOUNT:	☐ 6. Price Agreement.
	☐ 7. As Per Contract.
	☐ 8. No Lower Price Received.
	☐ 9. _____

FINAL APPROVALS:

FOR GENERAL ELECTRIC COMPANY

BY_____

FOR U. S. GOVERNMENT (SIGNED)

BY_____
(SIGNED)

CORRECT:

_____
BUYER

_____
ASSISTANT SUPERVISOR OF PURCHASES

_____

Copy for U. S. Government

351-356

COPY BOUND

237

PURCHASE ORDER
G.E. NUCLEONICS PROJECT

GENERAL ELECTRIC COMPANY

HANFORD WORKS
RICHLAND, WASHINGTON

DATE_____

ORDER NO.

HW—_____

SHOW ORDER NUMBER ON ALL PACKAGES, CORRESPONDENCE, INVOICES AND SHIPPING DOCUMENTS.

COMPLETE PACKING LIST MUST ACCOMPANY EACH SHIPMENT.

DELIVERY REQUIRED _____

SHIPPING PROMISE _____

REQ. NO. _____
G. E. ENGR. CONTRACT NO. W-31-109 ENG. 52

To

PLEASE SHIP, SUBJECT TO THE CONDITIONS ON THE REVERSE SIDE OF THIS ORDER, THE FOLLOWING MATERIAL:

PLEASE PREPARE GENERAL ELECTRIC INVOICE NOT FURNISHED YOU, AND FOLLOW DESCRIPTION SHOWN BELOW. MAIL INVOICES TO GENERAL ELECTRIC COMPANY, ACCOUNTING DEPARTMENT, RICHLAND, WASHINGTON.

ITEM NO.	QUANTITY	DESCRIPTION

SHIP AS FOLLOWS:
TO GENERAL ELECTRIC COMPANY
HANFORD WORKS

ORDER NO
DESTINATION
VIA
F.O.B. POINT

GENERAL ELECTRIC COMPANY
HANFORD WORKS

BY _____

DETACH BEFORE MAILING TO VENDOR

ITEM NO.	ACCOUNT

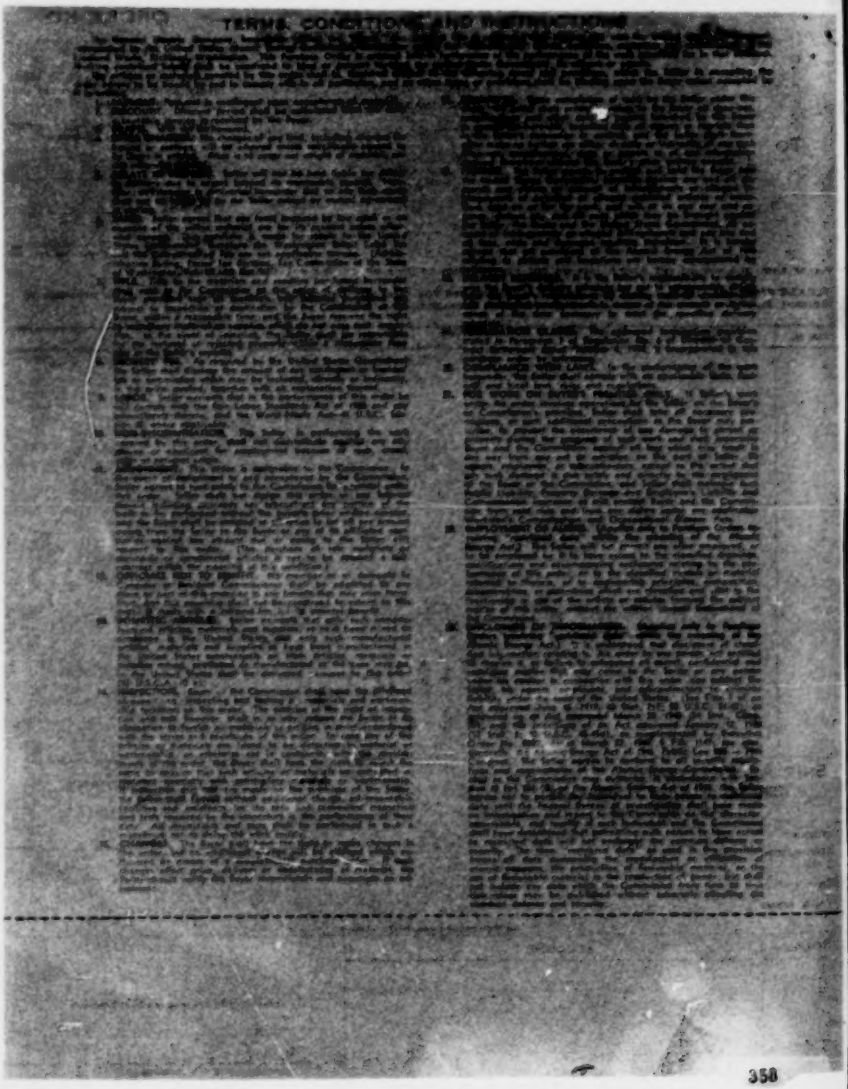
APPROVED FOR GENERAL ELECTRIC COMPANY

APPROVED FOR U. S. GOVERNMENT

Original For Vendor

357

CLOSE IN CENTER



COPY BOUND CLO

239

U. S. GOVT. CONTRACT NO. W-31-109 ENG. 82

PURCHASE ORDER

ORDER NO.

HW–

REQ. NO.

INVOICE NO. OR B/L NO.	CAR NO. OR RETURN NO.	WEIGHT OF SHIPMENT	EXPENSE BILL NUMBER	EXPENSE BILL AMOUNT	F/A OR CHARGED	NET AMOUNT OF INVOICE	APV NO.

S FOLLOWS:

ERAL ELECTRIC COMPANY

HANFORD WORKS

2

1—LOWEST PRICE
2—SATISFACTORY DELIVERY
3—BETTER QUALITY
4—BETTER OR REQUIRED DESIGN
5—ONLY AVAILABLE SOURCE KNOWN
6—PRICE AGREEMENT
7—AS PER CONTRACT
8—NO LOWER PRICE RECEIVED
9—

CHARGE AS FOLLOWS

SUPPLIER SELECTED BECAUSE OF REASON NUMBER ( ) ABOVE.

ACCOUNT

APPROVED FOR GENERAL ELECTRIC COMPANY

APPROVED FOR U. S. GOVERNMENT

Copy for G. E. Accounting Department

359-362

E IN CENTER

240

ALTERATION TO PURCHASE ORDER
NUCLEONICS DEPARTMENT

GENERAL ELECTRIC COMPANY

HANFORD WORKS
RICHLAND, WASHINGTON

DATE _____

ORDER NO.

HW—

SHOW ORDER NUMBER ON ALL PACKAGES, CORRESPONDENCE, INVOICES AND SHIPPING DOCUMENTS.

COMPLETE PACKING LIST MUST ACCOMPANY EACH SHIPMENT.

TO

REQ. NO. _____

U. S. GOVT. CONTRACT NO. W-31-109 ENG. 82

ITEM NO.	QUANTITY	DESCRIPTION
		THIS ALTERS THE ABOVE NUMBERED ORDER NOW IN YOUR POSSESSION

EXCEPT AS HEREIN SPECIFIED ALL TERMS AND CONDITIONS OF ORIGINAL ORDER REMAIN UNCHANGED.

GENERAL ELECTRIC COMPANY
HANFORD WORKS

BY _____

DETACH BEFORE MAILING TO VENDOR

ITEM NO. ACCOUNT

APPROVED FOR GENERAL ELECTRIC COMPANY

APPROVED FOR U. S. GOVERNMENT

Original For Vendor

363-367

COPY BOUND

241

HW 1.15
REV. 8-48

GENERAL ELECTRIC COMPANY
HANFORD WORKS
RECEIVING REPORT

G 117256

REC'D FROM _____ ORDER NO. HW _____

SHIPPING POINT _____ DATE _____

SHIPPED WITH _____ PAGE _____ OF _____ PAGES

CAR INITIAL AND NUMBER	FREIGHT BILL NO.	FRT. CHARGES	VIA

ITEM NO.	QUANTITY	DESCRIPTION

FRT. BILL WEIGHT

PIECES RECEIVED ON THIS REPORT

RETURNABLES ON RECEIVING REPORT NO.

M.D.R. NUMBER

DIFFERENCE SLIP

OVER & SHORT NUMBER

CERT. OF INSP. NUMBER

NVPL | VPL

WRITE UP DATE

ITEM NO.	COST CHARGE	AUTHOR OF REQUISITION	MATERIAL CHECKED FOR GE
		DELIVER TO	ABOVE MATERIAL RECEIVED AND ACCEPTED BY GENERAL ELECTRIC COMPANY
		RECEIPT FOR MATERIAL	AEC INSPECTED

368-372

LOSE IN CENTER

INFORMATION FOR WHICH SPACE IS HERE PROVIDED MUST BE SUPPLIED BY SHIPPER OR INVOICE WILL BE RETURNED FOR CORRECTION. DATED FROM DATE CORRECT INVOICE IS RECEIVED.

CONSIGNED TO

SHIPPED VIA

CAR NO. AND INITIAL

ORIGINATING POINT

SHIPPING WEIGHT ..... LBS.

BILL OF LADING NO.

PREPAID OR COLLECT

TERMS

..... PER CENT ..... DAYS ..... DAYS NET

DELIVERY
F. O. B.

RECEIPTED EXPENSE BILL MUST ACCOMPANY ALL CHARGES FOR TRANSPORTATION

COMPANY
HANFORD ENGINEER WORKS
RICHLAND, WASHINGTON

G E VOU No.

G E ORDER No.

SELLER'S No. ..... DATE

BOUGHT OF

STREET AND No.

CITY AND STATE

ORIGINAL BILL OF LADING AND TWO COPIES MUST ACCOMPANY THIS INVOICE OR MUST BE FURNISHED PROMPTLY AFTER RECEIPT OF SHIPPING INSTRUCTIONS

TEM No.	QUANTITY	DESCRIPTION	UNIT PRICE	AMOUNT

FINAL APPROVAL FOR G E	APPROVED FOR G E FOR PAYMENT ONLY	APPROVED FOR U. S. GOVERNMENT	APPROVED FOR U.S. GOVERNMENT FOR PAYMENT	AMOUNT OF INVOICE	
BY	BY	BY ..... FOR CHIEF FISCAL AUDITOR	BY ..... FOR CONTRACTING OFFICER		

FOR G E	AUDIT SCHEDULE	FOR U. S. GOVERNMENT INITIALS	DATE		
	EXTENSION AND FOOTINGS VERIFIED			CASH DISCOUNT	
	ENTERED IN INVOICE REGISTER			FREIGHT	
	PRICES AND DELIVERY TERMS COMPARED WITH PURCHASE ORDER			NET AMOUNT OF INVOICE	
MAT'L REC'D AS ORDERED	COMPARED WITH REC. REPORT NO.			CHECK NO.	
	TRANSPORTATION CHARGE APPROVED				

ORIGINAL FOR U.S. GOVERNMENT

373-381

242

COPY BOUN

243

RW1.6
R 4610a

Acknowledgment of Order and Delivery Promise

382

We Have Received Your Order No. H. W. .....

Material Will Be Shipped From: .....

.....

Located at .....

Via: .....

Promised Shipping Date .....

Vendor: .....

CLOSE IN CENTER

214

THIS SIDE OF CARD IS FOR ADDRESS

GENERAL ELECTRIC COMPANY

HANFORD WORKS

383

Att:
Operations Purchasing Division

RICHLAND, WASHINGTON

[fol. 384] PLAINTIFF'S EXHIBIT No. 13

Copy

Thurston County Cause No. 22640

Date Admitted: April 14, 1949

8 May 1946.

Mr. C. E. Wilson, President,
General Electric Company
New York, New York

DEAR MR. WILSON:

Now that you have had an opportunity to review the problem I wish to request that the General Electric Company enter into contract with the Manhattan Engineer District for the assumption of responsibility for research and development pertaining to the utilization of the transmutation method for production of fissionable materials and power and the operation of the Hanford Engineer Works.

As you know, the responsibility for research and development is now being carried in part by the Metallurgical Laboratory of the University of Chicago and in part by the Monsanto Chemical Company-Clinton Laboratories at Oak Ridge, Tennessee, while the E. I. du Pont de Nemours & Company is operating the production plants at the Hanford Engineer Works. It is to the national interests that the efforts of another major company be devoted to the research and development problems. This work can be better carried on if the company also assumes the responsibilities for the operation of Hanford. The Du Pont Company has informed us that they desire to be relieved of their responsibilities for operating Hanford in accordance with the terms of their contract at the earliest possible date.

After thorough study I have determined, and this opinion is concurred in by my associates, that the General Electric Company is best qualified to assume the responsibility for research and development of transmutation processes and the production of plutonium at the Hanford Engineer Works. In view of the national necessity for maintaining

our pre-eminence in this field, it is requested that you agree to accept these responsibilities.

Sincerely yours, L. R. Groves, Major General, U.S.A.

cc. Mr. H. A. Winne.

[fol. 385] PLAINTIFF'S EXHIBIT No. 14

This document consists of 2 pages No 1 of 1 rec'd copies, Series A attached to GE-H-10,021 c. 1 dated 6-7-46.

Thursday County Cause No. 22640

Date Admitted: April 14, 1949

Copy

Inv. 9-47

May 28, 1946.

SECRET

Major General L. R. Groves
War Department
P.O. Box 2610
Washington, D. C.

DEAR GENERAL GROVES:

I have your letter of May 8 requesting that the General Electric Company assume the responsibility for research and development pertaining to the utilization of the transmutation method for production of fissionable materials and atomic power, and for the operation of the Hanford Engineer Works.

I am highly appreciative of the confidence in the General Electric Company which you express in your letter, and which is implicit in your request that we undertake this activity. It is because of our desire to continue to deserve this confidence that we have been somewhat hesitant to accept this weighty responsibility. As you well realize, this project will place a very heavy demand upon the Company's technical and administrative resources.

I cannot help but agree that from every standpoint it is of tremendous importance to our national interests that

we maintain, and develop still further, our country's pre-eminence in the field of atomic energy, having in mind both its military applications and its tremendous peacetime potentialities as a power source, and in other beneficent applications. With this conviction, and the hope that our extensive research and engineering facilities can be useful toward this objective, I feel that I must agree to our undertaking this project.

This of course presupposes that we shall be able to work out a mutually satisfactory contract and. based upon our past experience with the Manhattan Engineer District, I see no reason to doubt that we shall. Since it is not yet certain what will be the ultimate form of legislation on atomic energy now under consideration by Congress, we shall want a provision in the contract which will permit us to be relieved of our obligation in case the legislation imposes conditions which in our sole judgment are unacceptable to us.

[fols. 386-395] Because of the many uncertainties involved in this project, I feel that any contract we enter into should insure to us a full recovery of all costs which we incur in connection with it, and should protect us against any liabilities which may result, since hazards of an unusual and unpredictable nature are involved. On the other hand, because of the tremendous national importance of this project, we do not expect, nor are we willing to accept, a profit on this contract, and therefore will undertake it only on the basis of full cost plus a fee of one dollar.

Mr. H. A. Winne of my staff will immediately get in touch with you or General Nichols to initiate the contract negotiations.

Sincerely yours, C. E. Wilson.

CEW:H HA Winne, RH Luebbe, JP Babcock.

[fol. 396] DEFENDANT'S EXHIBIT No. 20

Thurston County Cause No. 22640

Date Admitted: April 14, 1949

ADMINISTRATIVE RULINGS—EXCISE TAX DIVISION

Tax Commission of the State of Washington
Olympia

Vol. I—AR #5 Issued July 21, 1942

Tax Liability of Persons Performing "Cost-Plus-Fixed-Fee Contracts" for the United States of America, Under the Provisions of Title II (Business and Occupation Tax), Title III (Retail Sales Tax), and Title IV (Compensating Tax) of Chapter 180, Laws of Washington, 1935, as Amended, and Effective May 1, 1941

Definitions

For the purposes of this ruling:

A "contractor" means a person performing a "cost-plus-fixed-fee contract;"

A "cost-plus-fixed-fee contract" means only:

(1) a contract entered into by a person directly with the United States, or

(2) a contract entered into by a person directly with a contractor providing such contract is specifically approved by the United States, either by endorsement or by separate written agreement;

which provides, among other things, as follows:

(a) for the production of an article of tangible personal property, or

(b) for the construction, repair, alteration or improvement of real or personal property, for the United States;

(c) that title to all or a part of the tools, equipment and supplies used or consumed in connection therewith may, and title to all materials of every kind which become a part of the completed article or structure does,

vest in the United States prior to actual use or installation;

(d) that the contractor receives as full compensation, payment for all approved expenditures and expenses incident to the performance of his contract, and in addition thereto, a fixed sum or percentage as profit, or no sum as profit.

The "United States" means the United States of America or any department or instrumentality thereof.
[fol. 397] The definitions of other words and phrases contained in the law and in the published rules of the Tax Commission apply hereto.

Tax Liability

Business and Occupation Tax, Title II

A contractor performing labor and mechanical services upon materials owned by the United States, for the production of a new article of tangible personal property, is termed a "processor for hire," and is taxable as a retailer under the "Retailing" classification of Title II.

A contractor constructing, repairing, altering or improving real property, or repairing personal property, for the United States, is also taxable as a retailer under the "Retailing" classification of Title II.

The tax amounts to ¼ of 1% of gross proceeds of sales. "Gross proceeds of sales" means and includes the following:

(a) Fixed fees and bonuses received;

(b) Payments received for overhead, depreciation, and rentals;

(c) Payments received for taxes (except taxes imposed under said Title II), interest, labor costs, and for all other services; also for tools, supplies, equipment and materials purchased by the contractor and sold to the United States prior to actual use or installation.

In computing tax liability, there may be deducted from "gross proceeds of sales," so much thereof as constitutes payments received for sales made outside of the State of Washington by the contractor to the United States.

Retail Sales Tax and Compensating Tax, Titles III and IV

A contractor performing a "cost-plus-fixed-fee contract" is not required to pay either the Retail Sales Tax or the Compensating Tax upon the purchase or use of materials which become a part of a completed article or structure, since such materials are purchased for resale; nor is he required to collect the Retail Sales Tax upon the sale of such materials or upon services rendered, since these are sales to the United States.

Also, a contractor is not required to pay either the Retail Sales Tax or the Compensating Tax upon the purchase or use of tools, machinery, equipment and supplies, including consumable goods, which do not become a part of the completed article or structure, providing title thereto is vested in the United States prior to actual use or consumption in performing this contract.

Either the Retail Sales Tax or the Compensating Tax applies upon the purchase or use by the contractor of all tools, machinery, equipment and supplies, including consumable goods, providing title thereto is not vested in the United States prior to actual use or consumption by him.

[fol. 398] *General Provisions*

By reason of the diversity of the conditions contained in "cost-plus-fixed-fee contracts" and in other contracts made by the United States, and the inability of vendors to determine readily whether or not the Retail Sales Tax or the Compensating Tax applies upon sales made to federal contractors, all vendors selling tangible personal property or services to a person performing any type of contract for the United States, are relieved from all liability for the collection of either the Retail Sales Tax or the Compensating Tax upon such sales, providing the purchase order states in substance that the article or service is purchased for resale and that the purchase has been approved by the United States, and that neither the Retail Sales Tax nor the Compensating Tax is applicable thereto.

The following is a suggested form of statement to be shown on purchase orders, viz.:

> "This purchase is being made for resale and has been approved by the United States, and neither the Retail

Sales Tax nor the Compensating Tax imposed by the State of Washington is applicable hereto. By order of the Tax Commission contained in Administrative Ruling Vol. I—#5, the seller of the articles or services hereby ordered is relieved from all liability for the collection of either of said taxes."

Such a statement, however, is not controlling in respect to immunity from such taxes, and in the event it be determined by the Tax Commission through audit or otherwise that all or a portion of the purchases made, or the articles used by such contractors are subject to the said taxes, the Tax Commission will collect the same direct from the contractors rather than from their vendors.

This Administrative Ruling does not pertain to tax liability under cost-plus-fixed-fee contracts wholly completed, or to those portions partially completed, prior to May 1, 1941.

This Administrative Ruling supersedes Special Bulletin LB #52 issued February 3, 1942.

See Published Rule #137 for tax liability of persons taxable under the "Manufacturing" classification of Title II. The last paragraph of that portion of said rule under the heading "Materials Furnished in Part by Customer," is not applicable when the "customer" is the United States.

All Contractors Should Request the Tax Commission to Audit Their Accounts Prior to Final Settlement with the United States.

Effective as of May 1, 1941.

Tax Commission of the State of Washington.

TMJ:AW.

[fols. 399-400] ADMINISTRATIVE RULINGS—EXCISE TAX DIVISION

Tax Commission of the State of Washington
Olympia

Vol. 1—AR #8 Issued February 24, 1943

Purchases by Cost-Plus-Fixed-Fee Contractors for the Account of the United States Government

Cost-plus-fixed-fee contractors performing contracts for the Navy Department are not subject to tax under the "retailing" classification of the Business and Occupation Tax (Title II, Chapter 180, Laws of Washington of 1935, as amended), in respect to payments received by them for the purpose of paying the purchase price of materials and supplies purchased by such contractors for the account of the United States Government, when the purchase order therefor is approved by the officer-in-charge, and is accepted by the vendor subject to conditions contained therein substantially as follows:

> Title to all materials and supplies purchased hereunder shall vest in the United States Government upon its delivery to and acceptance by a representative of the Government or the Contractor.
>
> This purchase is made by the Government, and the Government shall be obligated to the vendors for the purchase price, but the Contractors shall handle all payments therefor on behalf of the Government. The vendor agrees to make demand or claim for payment of the purchase price from the Government through the medium of the Contractor. All purchases hereunder are made for the account of the Government, and all title, delivery and transportation papers shall be made out in the name of the Government, in care of the Contractor.

This ruling will apply to all existing cost-plus-fixed-fee contractors performing contracts for the Navy Department, when the provisions of such contracts have been revised or amended so as to empower such contractors to purchase

for the account of the United States Government. The printing of the foregoing provisions upon purchase orders and the approval of the order by the officer-in-charge will constitute sufficient evidence of the authority to purchase materials and supplies for the account of the Government.

Tax Commission of the State of Washington.

TMJ:jh

[fol. 401] Persons Performing Cost-Plus-Fixed-Fee Contracts for the United States of America

Rule 223

As used herein:

The word "contractor" means a person performing a cost-plus-fixed-fee contract;

The term "cost-plus-fixed-fee contract" means only a contract entered into with the United States (or with a person duly authorized by written agreement with the United States, to enter into a contract for, and to pledge the credit of, the United States), for the manufacture or production of any article of tangible personal property, or for the construction, repair, alteration or improvement of real or personal property, for the United States, or for the rendition of services to the United States, which contract, among other things, provides that the contractor shall receive as full compensation a reimbursement of all approved expenses and expenditures incident to the performance of his contract, and in addition thereto, a predetermined fixed sum as profit, or no sum as profit;

The words "United States" mean the United States of America and any department or instrumentality thereof;

The term "cost-plus-fixed-fee contract" does not include a contract for the furnishing of tools, supplies, equipment, materials or services to the contractor.

Business and Occupation Tax (Title II)

Contractors, as defined herein, are subject to tax under Title II in accordance with the principles laid down in Tax Commission's published rules, as follows:

As to Manufacturing or Processing for Hire, Rule 136;

As to Constructing and Repairing of New or Existing Buildings, Rule 170;

As to Building or Improving of Publicly Owned Roads, etc., Rule 171;

As to contracts involving only the Grading and Clearing of Land, Rule 172;

As to Service and Other Business Activities, Rule 224.

The measure of the tax under each of the foregoing classifications is the amount of the fixed fee received plus the amount of reimbursements or prepayments received on account of all costs and expenses incurred by the contractor.

The measure of the tax under each of the foregoing classifications includes payments made by the United States to the contractor for materials purchased by the contractor with his own funds, irrespective of whether or not the contractor is an agent of the United States. In no event shall a purchasing agency relationship between the contractor and the United States be recognized unless the contract itself specifically creates the contractor an agent of the government with power to pledge the credit of the government, and the government, and not the contractor, is obligated to the vendors for the purchase price. All funds placed under the control of the contractor for the purpose of paying his own obligations shall be deemed advance payments on account of his contract and construed as funds of the contractor.

The burden of proof is upon the contractor to establish the fact that any purchase was actually made by him as agent for the government and that the credit of the government was actually pledged, and that the government, and not the contractor, was obligated to the vendor for the purchase price.

Retail Sales Tax (Title III)

The Retail Sales Tax does not apply to sales made to the United States. The Retail Sales Tax applies to sales made to contractors to the extent set forth in said Rules 136, 170, 171, and 224.

Effective May 1, 1945.

[fol. 402] TAX COMMISSION OF THE STATE OF WASHINGTON

Olympia, Washington

Persons Performing Contracts on the Basis of Time and Material, or Cost-Plus-Fixed-Fee

Rule 223

Business and Occupation Tax (Title II)

Such persons are subject to tax under Title II in accordance with the principles laid down in Tax Commission's published rules, as follows:

As to Manufacturing or Processing for Hire, Rule 136;

As to Constructing and Repairing of New or Existing Buildings, Rule 170;

As to Building or Improving of Publicly Owned Roads, etc., Rule 171;

As to contracts involving only the Grading and Clearing of Land, Rule 172;

As to Service and Other Business Activities, Rule 224.

The measure of the tax under each of the foregoing types of contracts is the amount of profit or fixed fee received, plus the amount of reimbursements or prepayments received on account of sales of materials and supplies, on account of labor costs, on account of taxes paid, on account of payments made to sub-contractors, and on account of all other costs and expenses incurred by the contractor, plus all payments made by his principal direct to a creditor of the contractor in payment of a liability incurred by the latter.

Retail Sales Tax (Title III)

The Retail Sales Tax applies upon sales made to or by contractors to the extent set forth in said Rules 136, 170, 171, 172 and 224.

Effective May 1, 1947.

[fols. 403-414] DEFENDANT'S EXHIBIT No. 33

Thurston County Cause No. 22640

Date Admitted 4-14-49

[fol. 415] E. I. du Pont de Nemours & Company

Hanford Engineer Works
P. O. Box 429—Pasco, Washington

Procedure in Rendering Quotations

It is exceedingly important and will be of great assistance to us if you will adhere to the following procedure in rendering quotations:

1. Furnish three (3) copies of all quotations, accompanying data, letters of transmittal, etc., and have all quotations signed with all copies on your letterhead or quotation form.

2. All du Pont drawings or photostats sent with this inquiry or any resulting order shall be returned to E. I. du Pont de Nemours & Company, upon completion of fabrication or upon notification that the material has been purchased elsewhere and no reproductions or copies shall be retained by the bidder or supplier.

3. The material to be furnished on any order resulting from this inquiry shall be subject to du Pont expediting and inspection at the vendor's plant.

Price:

4. The quotations should adhere as nearly as possible to the form, item-listing, and specifications as submitted to you from this Department. Where specifications cannot be met precisely, alterations should be cited.

5. Advise total net price and where various items are listed, calculate lot-quotations and discount figures, showing net lot prices as well as net unit prices.

6. No price or other charge by the seller shall be in violation of the price control regulations of the United States Government.

7. All quotations must include definite terms of payment.

8. In rendering quotations, if supervision of erection is required and not included in the price of material, quote as a separate item in accordance with Form SC.

9. All orders over $2,000.00 including field labor at the site of the plant must be separately handled as sub-contracts to the prime contract and must meet the additional special requirements given in Form C.

Shipment:

10. This project has an "ANMB (Army and Navy Munitions Board) preference rating." Kindly render us your best dependable promise on shipment of this material.

11. Shipping Terms: If by rail or common carrier motor truck quote F. O. B. shipping point with commercial freight allowed to destination unless a lower price delivered is otherwise obtainable. If by vendor's truck, express or parcel post quote F. O. B. destination. (Show how you expect to ship.)

Unless otherwise agreed all rail or common carrier motor truck shipments must be made collect. The original and two copies of collect commercial bill-of-lading showing shipper's number, endorsed on the face "Military Property of the United States, for Military Use, subject to conversion to Government bill-of-lading at destination," must be mailed to the consignee as soon as original bill-of-lading is receipted by the carrier.

[fols. 416-418] 12. Destination for Shipments:

Freight: (C. L. & L. C. L.) Hanford, Washington; C. M. St. P. & P. R. R. Delivery.

Express: Pasco, Washington.

Parcel Post and Mail Address: P. O. Box 429, Pasco, Washington.

Vendor's Truck: Plant Site—near Hanford, Washington.

Common Carrier Motor Truck: Hanford, Washington.

Taxes:

13. All items are for use on a United States Government project and therefore may be exempted from Federal excise taxes. In submitting quotations, the bidder should state

whether or not Federal tax has been included, if otherwise applicable to the purchased article or its constituent parts. The amount of tax included or excluded should be stated separately so that an exemption certificate in the form prescribed by the Bureau of Internal Revenue may be furnished in lieu of such tax. In the absence of affirmative statements regarding the status of the tax, no exemption certificates will be issued.

Purchases made by buyer are for resale and are not subject to the Washington Retail Sales Tax and Washington Compensating Tax. However, sales to contractors with the United States Government are not exempt from the Washington Business and Occupation Tax and such tax, if otherwise applicable, shall be for the account of the seller.

Government Regulations:

14. The material to be furnished is for the benefit of the United States Government and title thereto will pass to the United States Government upon delivery, subject to subsequent inspection, and acceptance of the material. Kindly bear this in mind in rendering your quotation.

15. Returnable Containers: Government regulations prohibit payments for returnable containers; therefore, any billing for such containers must be made in memorandum only and not for reimbursement. This memorandum should show return shipping instructions.

16. As required by the United States Government, the bidder or supplier shall disclose the amount of any contingent or brokers' fee or any commission which may be included, directly or indirectly, in the price quoted, together with an explanation thereof.

17. The supplier or contractor in performing the work herein specified shall not discriminate against any worker because of race, creed, color or national origin.

18. Any contract resulting from this inquiry shall be assignable to the United States Government.

19. Any order involving a fixed price or lump sum in excess of $100,000.00 resulting from this inquiry will contain provisions subjecting it to renegotiation pursuant to the Sixth Supplemental National Defense Appropriation Act, 1942.

20. Seller warrants that food or clothing sold hereunder has been produced or manufactured in the United States substantially all from articles, materials or supplies mined, produced or manufactured in the United States.

CMP Information Required:

21. State whether this material is a Class A, Class B Group I, or Class B Group II item. If B-I or B-II, we will assume you will obtain necessary allotment. If A, the successful bidder must submit to us Summary Bill of Materials as soon as possible.

Purchasing Department, E. I. du Pont de Nemours & Company.

[fols. 419-420] E. I. du Pont de Nemours & Company, Incorporated

Hanford Engineer Works
P. O. Box 429, Pasco, Washington

Address Reply to This Department
Attention of T. W. Brown

Accounting Department

August 23, 1943.

T. M. Jenner, Chairman
Tax Commission of the
State of Washington
Olympia, Washington

Hanford Engineer Works

Project 9536

Washington Retail Sales Tax

Dear Sir:

In your letter dated August 12, 1943, you inquire regarding the contract under which E. I. du Pont de Nemours & Company has been engaged by the United States Government to construct a plant near Pasco, Washington.

The contract entered into between E. I. du Pont de Ne-

mours & Company, and the United States Government is known as a cost-plus-a-fixed-fee contract. In accordance with the provisions of the contract, I certify that all purchases, including purchases of materials, equipment and supplies of every nature, made or to be made by E. I. du Pont de Nemours & Company, pursuant to a cost-plus-a-fixed-fee contract with the United States for the construction of a war plant near Pasco, Washington, will be made for the purpose of resale to the United States.

Yours very truly, T. W. Brown, Chief Accounting Officer.

TWB:mc

[fol. 421] Tax Commission of the State of Washington

Report of Hearing

Taxpayer and Representatives: File No.

E. I. Du Pont de Nemours & Company
Hanford Project
by Lt. Col. R. G. Cornell
Manhattan District Engineer Office
P. O. Box 1111
Knoxville, Tennessee, or
261 5th Avenue
U. S. Engineer Officer
New York, New York
Mr. Geo. F. Meier
Local Civilian Attorney for
Army Engineer
Hanford, Washington

State of Washington Representatives:

T. M. Jenner and Jess N. Rosenberg

Place: Olympia
Statement of Facts:

Date: October 4, 1943.

Subject under discussion was liability of Du Pont under its cost-plus-fixed-fee contract for construction, etc., at Hanford, Washington. Among other things, it was stated

that the final contract between Du Pont and the government has not yet been executed although the work has been in progress for some months; that regardless of the cost of the project, Du Pont's fixed fee is to be but $1.00; that Du Pont Company did not seek this contract, but was rather drafted into it; that all purchases are made by Du Pont from funds furnished by the United States; that when Du Pont's purchases have been approved by the government officer in charge a reimbursement is made to Du Pont and Du Pont in turn reimburses the advance fund which the government had originally made available. In view of these facts, the contention was advanced that Du Pont was an agent of the government in making purchases under this contract, despite the statements regarding resale to the government made on the purchase order and contained in a letter by T. W. Brown to the Tax Commission. Representatives of the Tax Commission pointed out that, because of the great secrecy involved in the execution and handling of the taxpayer's contract, it was difficult for the commission to make accurate decisions regarding tax liability.

Decision:

It was agreed that the Tax Commisison would be furnished with excerpts from the contract, when executed, which are pertinent to tax liability and can be discussed [fol. 422] without violating the necessary secrecy surrounding the contract and that such information will be available to the members of the Tax Commission and to the Attorney General and his assistants, but not available to any other persons whatsoever. It was agreed that Du Pont was not an agent of the government to any greater degree than any other cost-plus-fixed-fee contractors and that it would be liable for the Business and Occupation Tax upon all of its reimbursements with respect thereto. It was further agreed, however, that this conclusion did not preclude the government from making Du Pont its agent for the purchase of materials and if that were in fact done in the contract and materials were so purchased, Du Pont would not be required to pay a Business and Occupation Tax measured by the value of articles purchased for the government, regardless of what form of purchase order was used. The government

does not wish to divulge to vendors that Du Pont does not purchase on its own account. The following contract provision was suggested as sufficient to achieve the government's object in seeking to avoid payment of Business Tax in respect to reimbursements for materials purchased:

> "The contractor is hereby made the agent of the United States Government for the purpose of purchasing materials and supplies used or consumed in constructing the facilities herein provided for, or used and consumed in the manufacture of the products to be produced hereunder, and all purchases made in the name of the contractor shall be made for, and on behalf of, the government, and the government and not the contractor shall be obligated to the vendors for the purchase price, but the contractor shall or may handle all payments therefor on behalf of the government."

It was agreed that the Business and Occupation Tax would be paid by Du Pont in respect to all labor costs at the rate of ¼ of 1% of the total reimbursements made therefor.

Jess N. Rosenberg.

JNR:LC

[fols. 423-442] Commissioners: T. M. Jenner, Chairman; T. S. Hedges, Floyd T. McCroskey.

State of Washington Tax Commission, Olympia

October 4, 1943.

Suggested provision for inclusion in contract between United States of America and E. I. duPont, deNemours and Company, providing for erection and operation of certain facilities known as the "Hanford Project."

"The contractor is hereby made the agent of the United States Government for the purpose of purchasing materials and supplies used or consumed in constructing the facilities herein provided for, or used and consumed in the manufacture of the products to be produced hereunder, and all purchases made in the name of the contractor shall be made, for and on behalf of the government, and the government

and not the contractor shall be obligated to the vendors for the purchase price, but the contractor shall or may handle all payments therefor on behalf of the government."

Tax Commission of the State of Washington, by
T. M. Jenner, Commissioner.

(Here follow 2 photolithographs, side folios 443, 444)

264A

DEFENDENT'S EXHIBIT NO. 25
Thurston County Cause No. 22640
Date Admitted 4-14-49

Mail One Copy to the Tax Commission of the State of Washington—Keep One Copy for Your Files

Page 1

Form 2406

EXCISE TAX RETURN

53373

Under Chapter 180, Laws of Washington 1935 as Amended by Chapters 96, 158 and 216, Laws of Washington 1941

For detailed instructions in completing this return refer to Form 2406-G.

DO NOT MAIL CASH OR STAMPS IN PAYMENT OF TAX.

Remittance. Make remittance payable to TAX COMMISSION and mail it with this return to the EXCISE TAX DIVISION, TAX COMMISSION OF THE STATE OF WASHINGTON, OLYMPIA, WASHINGTON, before the due date. The law provides penalties for failure to file return and make payments within the time specified.

This space for department use only

Remittance checked	File checked—Ck'd entry
Corrections	Office audit

DEC 20

BE SURE THAT NAME AND ADDRESS ARE CORRECT

Name: E. I. DU PONT DE NEMOURS & COMPANY
Street No.: HANFORD ENGINEER WORKS A-115-550
City and State: P. O. BOX 489 499-999
PASCO, WASHINGTON 299-321

This return for September-October, 1944.
Due December 15, 1944.
Thirty Day permanent extension.

Col. 1 Line No. or Law	Column 2 CLASSIFICATION	Column 3 Gross Amount	Column 4 Deductions (Enter Detail on Page 2)	Column 5 Taxable Amount	Col. 6 Rate	Column 7 Tax Due	Column 8 Do Not Use
II.	Extracting				.0025		
	Manufacturing				.0025		
BUSINESS TAX	Retailing*	39,413,260.64		39,413,260.64	.0025	98,533 15	
	Wholesaling—Wheat, Grain, Corn, Barley				.0001		
	Wholesaling—All others				.0025		
	Printing and Publishing				.0025		
	Public Road Construction				.0025		
	Service and Other Activities				.005		
III.	RETAIL SALES TAX*	39,413,260.64	39,329,813.32	83,447.08	.03	2,503 41	
IV.	COMPENSATING TAX—Complete schedule Title IV on the reverse side						
V.	Railroad, Express and Car Companies				.02		
	Water Distribution				.02		
	Light and Power				.02		
UTILITY TAX	Telephone—Telegraph				.02		
	Gas Distribution				.02		
	Highway Transportation				.015		
	Urban Transportation				.005		
	Vessels Under 65' in Length				.005		
	Other Public Service Business				.015		
XIII.	TAX ON COIN OPERATED MECHANICAL DEVICES—Attach Form 2002 A						

RECEIVED DEC 23 1944 Tax Commission

Line A.	TOTAL TAX DUE THIS PERIOD (Total of Column 7)		101,036	56
Line B.	PENALTY—A penalty of 10% of the tax due or of $5.00, whichever is the greater must be added when payment will not be received in the Tax Commissioners Office within 30 days of due date			
Line C.	TOTAL TAX AND PENALTY DUE—REMITTANCE ATTACHED		101,036	56

MUST BE FILED REGARDLESS OF THE AMOUNT OF TAX
Be Sure to Complete and Sign the Back of This Form
* Taxpayers reporting under Title III must also report under Title II
DO NOT MAIL CASH OR STAMPS IN PAYMENT OF TAX

443

2643

Page

BUSINESS TAX DEDUCTIONS—TITLE II

Detail of Amounts Deducted in Column 4, Page 1, Title II, Must Be Shown Below for Each Applicable Business Classification.

TYPE OF DEDUCTION		Extracting	Manufacturing	Retailing	Wholesaling	Services and Other Activities
Bad Debts	7.					
Gas Tax (Gal. at 6½¢)	2.	[redacted]	[redacted]			[redacted]
Interstate—Foreign Sales	6.	[redacted]	[redacted]			
Cash and Trade Discounts	1.					
Other, explain—						
Total Business Tax Deductions						

SALES TAX DEDUCTIONS—TITLE III

Detail of Amount Deducted in Column 4, Page 1, Title III, Must Be Shown Below.

TYPE OF DEDUCTION		Amount
Interstate—Foreign Sales	6.	
Sales to U. S. Government	5.	39,329,815 52
Motor Vehicle Fuel (Gallons)	3.	
Cash and Trade Discounts	1.	
Other, explain—		
Total Sales Tax Deductions		39,329,815 52

UTILITY TAX DEDUCTIONS—TITLE V

Detail of Amount Deducted in Column 4, Page 1, Title V, Must Be Shown Below.

However, if engaged in more than one utility business, attach report deduction schedules for each utility.

TYPE OF DEDUCTION		Amount
Commodity Sales for Resale	4.	
Bad Debts	7.	
Interstate—Foreign	6.	
Cash and Trade Discounts	1.	
Other, explain—		
Total Utility Tax Deductions		

COMPENSATING TAX SCHEDULE—TITLE IV

Before Completing This Schedule READ INSTRUCTIONS on Form 3408-G

	Value Including Transportation	Rate	Tax Due
1. Articles used by the taxpayer in this state and acquired either within or without the state and on which neither sales nor compensating tax has been paid		.03	
2. Articles extracted or manufactured by, and used by the taxpayer in this state (value is retail price)		.03	
3. Attach separate sheet showing value (selling price plus transportation cost) of all articles sold by you and shipped from without this state. If transportation cost is not known to you, give name and address of purchaser. Enter in last column amount of tax collected by you		.03	
Total—Enter Total in Column 7, Page 1, Title IV			

The undersigned taxpayer declares that he has read the foregoing return and certifies it to be correct.

Dated this 29th day of November, 194 4 Firm name E. I. DU PONT DE NEMOURS & COMPANY

By [signature]

Office or title ASSISTANT CHIEF ACCOUNTING OFFIC

If Additional Space Is Needed Attach Supplementary Sheets of This Size

ORIGINAL—FOR TAX COMMISSION

444

[fol. 445] DEFENDANT'S EXHIBIT No. 26

Thurston County Cause No. 22640

Date Admitted 4-14-49

Administrative Ruling—Excise Tax Division

Tax Commission of the State of Washington
Olympia

Vol. V—AR #7 (Formerly Vol. III—AR #9)

Re-issued—April 26, 1948. Effective November 13, 1946

Sales to General Electric Company

The General Electric Company is engaged in performing a cost-plus-fixed-fee contract for the United States under Contract No. W31-109 eng-52 involving the operation of the Hanford Engineer Works.

All vendors are relieved from liability for the collection of Retail Sales Tax or the Compensating Tax (Titles III and IV of the Revenue Act of 1935, as amended) upon sales or use of property heretofore or hereafter sold by them to the General Electric Company, when said company gives such vendors a resale certificate in usual form or when the purchase order for goods contains a statement to the effect that the articles purchased are for resale to the United States and are to be used in the performance of the contract above mentioned.

In the event it be hereafter determined that the sale or use of any property so purchased was properly subject to tax, the Tax Commission will collect the same directly from General Electric Company and not from its vendors.

Tax Commission of the State of Washington.

TMJ:mlb.

[fols. 446-447] DEFENDANT'S EXHIBIT No. 27

Thurston County Cause No. 22640

Date Admitted 4-14-49

Petition of General Electric Company to the Tax Commission of the State of Washington

The undersigned, the General Electric Company, a corporation organized under the laws of the State of New York, does hereby file this petition in conformity with Section 199 of the Revenue Act of 1935 as amended by Section 29, Chapter 225 of the laws of Washington of 1939, for a hearing and a correction of the amount of Washington State business and occupation taxes assessed against it under the provisions of Title II of the Revenue Act of 1935 as amended, entitled "Business and Occupation Tax", being Section 8370-4 to and including Section 8370-15 of Remington's Revised Statutes of Washington as amended. Such taxes have been paid by it to the Tax Commission of the State of Washington under protest upon the dates, for the periods and in the amounts hereinafter set forth:

Date Paid	Covering Period	Amount Paid
Feb. 5, 1947	Sept. 1, 1946 to Oct. 31, 1946	$2,931.38
Feb. 5, 1947	Nov. 1, 1946 to Dec. 31, 1946	6,034.17
March 19, 1947	Jan. 1, 1947 to Feb. 28, 1947	12,500.74
May 21, 1947	Mar. 1, 1947 to Apr. 30, 1947	10,531.22
		31,997.51

The reasons why the requested hearing should be granted and the amount in which such tax should be reduced are as follows:

A. On the 1st day of September 1946 the petitioner entered upon performance in the State of Washington of a pure cost contract with the United States of America (represented by the War Department, Manhattan Engineer District), dated the 15th day of May 1946 and designated Contract No. W-31-109-eng-52. This contract is classified "Secret". Upon obtaining proper authorization petitioner will make available to the Tax Commission of the State of

Washington relevant provisions of the contract, and the relevant facts concerning the operations under the contract. In substance, the contract provides that the petitioner's sole compensation for complete performance of the contract is to be the nominal sum of $1.00, and the United States of America bears the entire costs and risks of the operation.

B. In the performance of this contract the petitioner has been required to disburse and has disbursed large sums of money in payment of wages and salaries to those employed in the performance of the contract and for and in the acquisition of materials, supplies and equipment necessary to such performance. Pursuant to the provisions of the contract, the United States of America through its disbursing agents has made reimbursement to the petitioner from time to time of the sums disbursed by it.

[fol. 448] Respectfully submitted, General Electric Company, by H. A. Winne, Vice President.

STATE OF NEW YORK,
County of Schenectady, ss:

H. A. Winne being duly sworn, deposes and says:

That he is Vice President of General Electric Company, the taxpayer on whose behalf the foregoing petition is filed; that he has read the same and that the statements made therein are true and correct to the best of his knowledge and belief.

H. A. Winne.

Subscribed and sworn to before me this — day of July, 1947. John W. Bremer, No. 82, Notary Public, State of New York. Residing in Schenectady County. My Commission Expires March 30, 1949.

[fols. 449-450] Received July 22, 1948.

Petition of General Electric Company to the Tax Commission of the State of Washington

The undersigned, the General Electric Company, a corporation organized under the laws of the State of New York,

does hereby file this petition in conformity with Section 199 of the Revenue Act of 1935 as amended by Section 29, Chapter 225 of the laws of Washington of 1939, for a hearing and a correction of the amount of Washington State business and occupation taxes assessed against it under the provisions of Title II of the Revenue Act of 1935 as amended, entitled "Business and Occupation Tax", being Section 8370-4 to and including Section 8370-15 of Remington's Revised Statutes of Washington as amended. Such taxes have been paid by it to the Tax Commission of the State of Washington under protest upon the dates, for the periods and in the amounts hereinafter set forth:

Date Paid	Covering Period	Amount Paid
July 30, 1947	May 1, 1947 to June 30, 1947	$11,912.44
Sept. 24, 1947	July 1, 1947 to August 31, 1947	13,921.25
Dec. 2, 1947	Sept. 1, 1947 to October 31, 1947	16,557.59
Feb. 6, 1948	November 1, 1947 to December 31, 1947	29,684.91
April 2, 1948	January 1, 1948 to February 29, 1948	41,013.75
June 6, 1948	March 1, 1948 to April 30, 1948	60,480.53
		173,570.47

The reasons why the requested hearing should be granted and the amount in which such tax should be reduced are as follows:

A. On the 1st day of September 1946 the petitioner entered upon performance in the State of Washington of a pure cost contract with the United States of America (represented by the War Department, Manhattan Engineer District), dated the 15th day of May 1946 and designated Contract No. W-31-109 eng-52. This contract is classified "Secret". Upon obtaining proper authorization petitioner will make available to the Tax Commission of the State of Washington relevant provisions of the contract, and the relevant facts concerning the operations under the contract. In substance, the contract provides that the petitioner's sole compensation for complete performance of the contract is to be the nominal sum of $1.00 and the United States of America bears the entire costs and risks of the operation.

B. In the performance of this contract the petitioner has been required to disburse and has disbursed large sums of money in payment of wages and salaries to those employed

in the performance of the contract and for and in the acquisition of materials, supplies and equipment necessary to such performance. Pursuant to the provisions of the contract, the United States of America through its disbursing agents has made reimbursement to the petitioner from time to time of the sums disbursed by it.

[fols. 451-453] Respectfully submitted, General Electric Company, by R. C. Muir, Vice President.

STATE OF WASHINGTON,
County of Benton, ss.:

R. C. Muir, being duly sworn, deposes and says:

That he is Vice President of General Electric Company, the taxpayer on whose behalf the foregoing petition is filed; that he has read the same and that the statements made therein are true and correct to the best of his knowledge and belief.

R. C. Muir.

Subscribed and sworn to before me this 20 day of July, 1948. Jane W. Jones, Notary Public.

[fols. 454-455] IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1953

No. 335

GENERAL ELECTRIC COMPANY and UNITED STATES, Appellants,

v.

THE STATE OF WASHINGTON, Appellee

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed October 8, 1953

a. Appellants adopt for their statement of points upon which they intend to rely on their appeal to this Court the points contained in their assignment of errors heretofore filed.

Acknowledge of service (omitted in printing).

[fols. 456-457] [File endorsement omitted]

[fols. 458-465] Appellee's Designation of parts of Record to be printed (omitted in printing).

[fol. 464] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1953

No. 335

[Title omitted]

ORDER NOTING PROBABLE JURISDICTION—November 9, 1953

Appeal from the Supreme Court of Washington.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary docket.

(1834)

INDEX

Subject Index

	Page
Statement as to jurisdiction	1
Opinions below	1
Jurisdiction	2
Question presented	5
Statutes involved	5
Statement	5
The questions are substantial	10
Appendix "A"—6 Revised Code of Washington, 1951 (Revenue Act of 1935, Title II, as amended)	15
Appendix "B"—Memo opinion, findings of fact and conclusions of law of the Superior Court of Thurston County	23
Appendix "C"—Opinion of the Supreme Court of Washington	36

Table of Cases Cited

Carson v. *Roane-Anderson Co.*, 342 U.S. 232	3, 10, 11
Dahnke-Walker Co. v. *Bondurant*, 257 U.S. 282	2, 4
Esso Standard Oil Co. v. *Evans*, 345 U.S. 495	2
Flournoy v. *Wiener*, 321 U.S. 253	4
General Electric Co. v. *Washington*, 256 P. (2d) 265	2
Mason Co. v. *Tax Commission*, 302 U.S. 186	12
Prudential Ins. Co. v. *Cheek*, 259 U.S. 530	4
Standard Oil Co. v. *Johnson*, 316 U.S. 481	2, 4
Wilson v. *Cook*, 327 U.S. 474	4
United States v. *Allegheny County*, 322 U.S. 174	2

Statutes Cited

Atomic Energy Act of 1946:	
Section 9b	2, 3, 4, 5, 9, 10, 11, 12, 13, 14
Section 10	7
Executive Order No. 9818, 12 Fed. Register 37	10
Executive Order No. 9925	7
First War Powers Act of 1941, c. 593, 55 Stat. 838	5

Revised Code of Washington, Colume 6:

	Page
Section 82.04.220	8
Section 82.04.430	4

United States Code, Title 28:

Section 1257(2)	2, 4
Section 1257(3)	4
Section 2103	4
Washington Business and Occupation Tax (Title II, c. 180, Laws of Washington 1935, as amended 6 Revised Code of Washington (1951) Secs. 82.04.010, et seq.)	5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 31962

GENERAL ELECTRIC COMPANY, A CORPORATION, AND UNITED STATES OF AMERICA,
Respondent and Intervenor,

vs.

THE STATE OF WASHINGTON,
Appellant

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, General Electric Company, and the United States of America, appellants (in the Supreme Court of the United States), submit herewith their statement particularly disclosing the basis upon which the Supreme Court of the United States has jurisdiction on appeal to review the judgment of the Supreme Court of the State of Washington entered in this cause.

Opinions Below

The opinion of the Superior Court of Thurston County is not reported. The opinion of the Supreme Court of the State of Washington reversing the judgment of the Su-

perior Court is reported at 256 P. 2d 265. Copies of the Superior Court's memorandum opinion and findings of fact and conclusions of law, and the opinions of the Supreme Court are attached hereto in Appendix B and C, respectively.

Jurisdiction

1. The judgment of the Supreme Court of Washington was entered on April 14, 1953. A petition for rehearing was seasonably filed on May 6, 1953, by appellants, General Electric Company and the United States, was entertained, and was denied by an order entered May 18, 1953. The jurisdiction of the Supreme Court of the United States to review this decision by direct appeal is conferred by Title 28 U. S. C., Section 1257(2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Dahnke-Walker Co.* v. *Bondurant*, 257 U. S. 282; *Standard Oil Co.* v. *Johnson*, 316 U. S. 481; *United States* v. *Allegheny County*, 322 U. S. 174, 191; *Esso Standard Oil Co.* v. *Evans*, 345 U. S. 495.

2. In its complaint filed in the Superior Court of Thurston County, appellant General Electric Company alleged that "Title II of the Revenue Act of 1935, as amended, as applied by the Tax Commission of the State of Washington to this plaintiff, is invalid under the Constitution of the United States of America, and under the Act of Congress hereinabove mentioned." The Act of Congress referred to was "Section 9(b) of an Act of the Congress • • • commonly known as the 'Atomic Energy Act of 1946.'" (Tr. 4). The United States intervened in the Superior Court, and in its petition in intervention adopted these allegations (Tr. 12). The Superior Court of Thurston County ruled favorably upon these contentions, holding that Section 9(b) of the Atomic Energy Act of 1946 (Appendix A, *infra*) exempted General Electric Company from imposition of the Washington business and occupation tax.

On appeal to the Supreme Court of Washington, appellee, the State of Washington, urged in its brief (1) that the business and occupation tax was validly imposed on General Electric Company, (2) that Congress does not have constitutional power to exempt a federal contractor from this type of state taxation, and (3) that Section 9(b) of the Atomic Energy Act of 1946 does not prohibit imposition of the tax on General Electric. Appellants, General Electric Company and the United States, urged in their brief that the judgment of the lower court was correct, and that the decision in *Carson* v. *Roane-Anderson Co.*, 342 U. S. 232, had authoritatively determined that Section 9(b) of the Atomic Energy Act of 1946 immunized contractors, such as appellant, from the kind of state or local taxation involved here. The Supreme Court of Washington stated in its opinion (Appendix C, *infra*) that Section 9(b) of the Atomic Energy Act of 1946 was not before the court for construction or application, that it was not bound by the decision in *Roane-Anderson*, since that case involved a sales and use tax, and that the incidence of the tax here did not fall on General Electric as an instrumentality of the United States; it held, accordingly, that the Washington business and occupation statute was valid as applied here.

In their petition for a rehearing, appellants General Electric Company and the United States asserted that, under Article VI of the United States Constitution, Section 9(b) of the Atomic Energy Act was directly before the Court, and that this section had been broadly construed by the Supreme Court of the United States in the case of *Carson* v. *Roane-Anderson Co.*, 342 U. S. 232, which decision was binding upon the Supreme Court of the State of Washington. The petition for rehearing was denied by an order entered May 18, 1953.

3. The validity of the Washington statute was drawn in question and sustained and the Supreme Court of the

United States therefore has jurisdiction of this appeal under 28 U. S. C. Section 1257(2), even though the Washington statute expressly provides that in computing tax there may be deducted from the measure of the tax amounts derived from business which the State of Washington is prohibited from taxing under the Constitution or laws of the United States. 6 Revised Code of Washington (1951), Sec. 82.04.430 (Appendix A, *infra*). The Supreme Court of the United States is not deprived of jurisdiction on direct appeal by virtue of the fact that the Supreme Court of Washington purported to exclude the case from the operation of Section 9(b) of the Atomic Energy Act of 1946 by holding that the operation of the Hanford Atomic Energy Installation by General Electric Company pursuant to its contract was not an activity of the Atomic Energy Commission. In so holding, the State Supreme Court was applying federal law and was upholding the validity of the Washington statute as it pertained to the present facts. Similar attempts to avoid a conflict between the State law and a federal statute or the United States Constitution may be found in *Standard Oil Co.* v. *Johnson*, 316 U. S. 481, 482-483, and *Dahnke-Walker Co.* v. *Bondurant*, 257 U. S. 282. In both of these cases the Supreme Court of the United States upheld its jurisdiction on direct appeal.

4. The Supreme Court of the United States has jurisdiction to consider those issues presented herein which may not be appealable under 28 U. S. C., Section 1257(2), but are reviewable by certiorari under 28 U. S. C., Section 1257(3), since all such issues are included in the Assignment of Errors filed herewith. See *Flournoy* v. *Wiener*, 321 U. S. 253, 263; *Prudential Ins. Co.* v. *Cheek*, 259 U. S. 530, 547; *Wilson* v. *Cook*, 327 U. S. 474, 482. See also 28 U. S. C., Section 2103.

Question Presented

Whether the Washington business and occupation tax can constitutionally be applied to an independent contractor performing activities duly authorized under a "pure cost" contract with the Atomic Energy Commission, in view of the provisions of Section 9(b) of the Atomic Energy Act of 1946.[1]

Statutes Involved

The pertinent provisions of the Washington business and occupation tax statute (Title II, c. 180, Laws of Washington, 1935, as amended, 6 Revised Code of Washington (1951), Secs. 82.04.010, *et seq.*), and the Atomic Energy Act of 1946, c. 724, 60 Stat. 755, are set forth in Appendix A, *infra*.

Statement

1. On May 15, 1946, acting pursuant to and in accordance with delegations of authority under the First War Powers Act of 1941, c. 593, 55 Stat. 838, the Manhattan Engineer District, Corps of Engineers, War Department, entered into a pure cost contract, No. W-31-109 Eng.-52, with the appellant, General Electric Company. This contract was subsequently formally adopted by the United States Atomic Energy Commission on January 28, 1947.

In general, the contract contemplates that the General Electric Company is to provide the personnel and certain technical experience and that the Government is to provide the facilities and funds to operate successfully the Hanford Engineer Works, a federally owned atomic energy installation located at Richland, Washington. Under its contract appellant, General Electric Company, is obligated to: (1) manage and operate all the fissionable material production

[1] All the points raised in the Assignment of Errors are also presented. The Question Presented above stated sets forth the major issue.

facilities of the Hanford Engineer Works; (2) manage and operate the village of Richland, Washington, and the construction camp community at North Richland, providing necessary municipal facilities and services at Government expense and serving as agent for the Government for all real estate which comprises the community; (3) construct or provide for the construction of plants and facilities needed for the manufacturing processes and related facilities and residential housing and other facilities necessary for the functioning of the community; (4) provide architect-engineer services in connection with the foregoing; (5) conduct development and research relative to production of fissionable materials.

Actual plant management and operation of all fissionable material production facilities is carried on by employees of the General Electric Company under the general supervision and direction of the Atomic Energy Commission. General Electric performs general municipal activities for the community of Richland. It constructs and maintains necessary roads. It also provides, at Government direction, school facilities, police and fire protection, sewerage, lighting, town bus system, dormitories and a hospital, all of which are Government owned. In addition, it manages and maintains housing facilities at Richland, and grants licenses and leases for the operation of businesses and commercial enterprises for the benefit of personnel connected with the project. Among the architectural and engineering services required by the contract are the preparation of preliminary studies, final designs, cost estimates and field tests.

General Electric's actions with respect to the performance of the contract are at all times under the constant supervision and direction of the Hanford Operations Office of the Atomic Energy Commission. Prior approval or ratification of the Atomic Energy Commission must be obtained for all purchases or contracts over $5,000, all construction

contracts over $2,000 and all purchases or use of materials, supplies or equipment of General Electric's own manufacture when the price exceeds $250. The Commission has the right to pay directly to third parties all sums due for labor, material and other charges arising from the contract. The salaries of employees are subject to the approval of the contracting office, as is the extent and character of training given to personnel. In the construction, operation and research phases of the contract General Electric is subject to the administrative and technical procedures prescribed by the Atomic Energy Commission, and must meet production schedules prescribed by the Commission.

Although the United States has not assumed exclusive jurisdiction over the Hanford Engineer Works area, complete control is exercised over it. All unauthorized persons are excluded from the area, with the exception of the village of Richland and the community of North Richland. All ingress and egress of people is controlled, and only permitted to those on official business who have obtained security clearance in accordance with the requirements of Section 10 of the Atomic Energy Act of 1946 (42 U. S. C. 1946 ed., Sec. 1810). On January 17, 1948, the President of the United States, by Executive Order No. 9925, established an air space reservation over the Hanford Works at Richland, Washington.

By virtue of the terms of the Atomic Energy Act of 1946, as amended, and the contract, there is vested in the Atomic Energy Commission title to all property, equipment, designs, drawings and specifications procured are created under the contract. The fissionable materials used in the operation of the plant are procured and furnished by the Government. Their use while in the process and after manufacture is carefully and systematically controlled and accounted for under the direction of the Government, as is the use of the product and all its component parts. Patents

to all processes and designs conceived or developed under the contract are owned by the Government or are assignable to it if the Commission desires. All property, materials, supplies or equipment procured by the General Electric Company for use under the contracts must be suitably marked in a special manner that clearly indicates that the items are the property of the Government. All procurements are approved by the Government. The General Electric Company owns none of the real or personal property which it operates or manages in the performance of its contract.

General Electric has never been required to utilize its own funds. The Commission is obligated to reimburse it for all costs of whatever nature incurred under the contract. Salaries of employees, the cost of materials procured for the work and any and all expenses incurred are paid out of a fund created (1) by advances and current reimbursements from the United States, (2) by funds received by General Electric from third parties in connection with the contract and deposited in the account, and (3) by credits received from pay roll deductions. This fund is maintained in a special bank account separate from General Electric's own funds. General Electric is to receive as sole payment for its services at the completion of the contract a fixed fee of one dollar.

2. The Washington business and occupation tax statute imposes a tax upon "every person * * * for the act or privilege of engaging in business activities". 6 Revised Code of Washington (1951), Section 82.04.220 (Appendix A, *infra*). From the date of General Electric's entry upon the performance of the contract with the Government, and continuously since, the Tax Commission of the State of Washington has asserted that in the performance of its contract General Electric is engaged in business as one making sales at retail, one of the seven general classifica-

tions into which the act divides all business activities. The tax asserted by the state has been measured by the total of the amounts paid by the United States into General Electric's account as reimbursement for its expenses, the amounts received by General Electric from third parties in connection with the contract and deposited in the account, and credits received through pay roll deductions. Appellant General Electric did not challenge the suitability of the retailer classification (under which the tax was measured),[2] the measure used to compute the tax, or the correctness of the tax computation. It maintained that the Washington business and occupation tax statute, as applied to General Electric's performance of its contract with the Atomic Energy Commission, was invalid under the Constitution of the United States and under Section 9(b) of the Atomic Energy Act of 1946. Solely in order to avoid penalties, General Electric paid in full the taxes demanded by the Tax Commission up to the date of the commencement of this action, amounting to $462,329.46.

In conformity with the statutes of the State of Washington appellant, General Electric Company, in due time filed its petition for refund of the taxes paid by it. The Tax Commission of the State of Washington conducted hearings upon the petition filed by the General Electric Company, and on April 1, 1949, entered its order denying the refund. General Electric filed a Notice of Appeal in the Superior Court of Thurston County and the United States of America intervened. Trial was had at which testimony of witnesses was received and exhibits introduced. The Superior Court entered judgment for General Electric Company and ren-

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[2] The opinion of the Supreme Court of Washington, in its statement of the case, erroneously quotes those provisions of the business and occupation tax pertaining to manufacturers. No claim was ever advanced by the Washington Tax Commission that General Electric fell within the manufacturer classification of the statute.

dered findings of fact and conclusions of law. By stipulation of counsel, it was agreed that General Electric had paid additional business and occupational tax for the period January 1, 1949 through June 30, 1951 of $485,750.19, which amount the court found should be included within the allowed recovery, a total of $938,437.25. In a memorandum opinion it held that Section 9(b) of the Atomic Energy Act of 1946 exempted General Electric from the tax with respect to its performance under the contract on and after January 1, 1947, the date on which the Atomic Energy Commission acquired control over the project.[3]

The State of Washington appealed to the Supreme Court of the State of Washington where the judgment of the Superior Court was reversed. The Supreme Court of Washington, three Justices dissenting, held that, under the circumstances of this case, Section 9(b) of the Atomic Energy Act of 1946 was not before the court for construction or application, that it was not bound by the decision in the case of *Carson* v. *Roane-Anderson Co.*, 342 U. S. 232, and that the Washington business and occupation tax statute was valid as applied here. Appellant's petition for rehearing was denied by order entered May 18, 1953.

The Questions Are Substantial

1. By Section 9(b) of the Atomic Energy Act of 1946, Congress provided that the Atomic Energy Commission, its property, activities, and income are expressly exempted from taxation in any manner or form by any state, county,

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[3] General Electric began paying the tax September 1, 1946. Operation of the Hanford Engineer Works did not fall under the authority of the Atomic Energy Commission until January 1, 1947 when, pursuant to Executive Order No. 9816, 12 Fed. Register 37, the atomic energy enterprise was transferred to it from the Manhattan Engineer District. The Superior Court of Thurston County found that General Electric was not entitled to a refund of the amount paid prior to this date. No appeal was taken to this ruling.

municipality or subdivision thereof. In the case of *Carson v. Roane-Anderson Co.*, 342 U. S. 232, the Supreme Court was recently called upon to examine the meaning of the term "activities" as there used. The specific issue was whether, in view of the provision of Section 9(b) of the Atomic Energy Act of 1946, the State of Tennessee could validly impose its sales and use tax on the purchase and use of materials and supplies by independent contractors in the performance of cost-reimbursement contracts with the Atomic Energy Commission. It was contended by the State of Tennessee that the work of these cost-type contractors in performing their contracts with the Atomic Energy Commission was not "an activity" of the Commission, and that the contractors were therefore not exempted from local taxation. This argument was rejected unanimously by the Court, which held that Congress had used the word "activities" in the Act with the intention that it be given a broad sweep which would describe all of the functions of the Commission. The Court pointed out that, under the Act, the Commission was authorized to perform its functions by the use of independent contractors and that, in fact, this was the pattern of conduct visualized by the Act. That being so, and in the absence of contrary evidence in the legislative history, the term "activities" was held to mean (p. 236) "all authorized methods of performing the governmental function" even though accomplished through independent contractors. It was decided, accordingly, that the independent contractors were exempt from the local sales and use tax.

The contracts between the Atomic Energy Commission and the contractors in the *Roane-Anderson* case contained substantially the same provisions as does the contract between the Commission and General Electric Company in the present case. General Electric performs the same functions for the Commission in the State of Washington as was

performed by the contractors in the *Roane-Anderson* case in the State of Tennessee, and, for the reasons expressed in that case, General Electric's performance of its contract also constitutes "activities" of the Atomic Energy Commission. To the extent that General Electric carries on the "activities" of the Atomic Energy Commission, Section 9(b) expressly exempts it from any manner or form of non-federal taxation, without regard to any distinction in the designation of the tax asserted. Although the *Roane-Anderson* case involved a sale and use tax, while here a business and occupation tax is being levied, the tax here imposed is no less on the "activities" of the Atomic Energy Commission than was the tax considered in the *Roane-Anderson* case and that decision should have been considered dispositive of the issue here.

Although the decision in the *Roane-Anderson* case was called to the attention of the Supreme Court of Washington, both in appellant's brief on appeal and in their petition for rehearing, the court's opinion first stated that Section 9(b) of the Atomic Energy Act of 1946 was not before the court for application or construction, and then proceeded to determine that General Electric's performance of its contract was not an activity of the Atomic Energy Commission. It further announced that the decision in the *Roane-Anderson* case was not binding upon it under the circumstances of this case, and ruled that the tax was valid as imposed upon the General Electric Company under the Washington business and occupation tax statute. As was pointed out by the dissenting justices, in so holding the Supreme Court of Washington ignored the fact that under Article VI of the United States Constitution a valid federal statute was directly before it. Furthermore, *Mason Co.* v. *Tax Commission*, 302 U. S. 186, relied on by the Supreme Court of Washington, does not support its decision. The *Mason Co.* case, holding that there was no implied constitutional immunity which

would prevent the State of Washington from levying its occupation tax on a contractor with the Federal Government, did not involve an express exercise by Congress of its constitutional power to protect any of its agencies from state taxation. Here, as was plainly decided in the *Roane-Anderson* case, Congress has acted to create such protection by Section 9(b) of the Atomic Energy Act.

2. The questions involved are substantial and important because of the Atomic Energy Commission's wide use of private contractors in carrying out its extensive program in research and development relating to atomic energy. The plants and facilities of the Government engaged in this work are distributed throughout the United States, and are operated at present almost entirely by private business and educational organizations under contract with the Commission. The decision of the Washington Supreme Court has given rise to doubts in an area which we believe this Court's decision in the *Roane-Anderson* case was intended to settle. Thus, the Indiana tax authorities, relying in part on the Washington court's decision, are presently asserting that contractors of the Commission are liable for Indiana gross income and gross receipts taxes based on their operations for the Commission at its Dana, Indiana, plant. Similarly, the Ohio tax authorities have recently advised the Commission that in view of the Washington court's decision they are no longer willing to recognize an exemption under Section 9(b) of the Atomic Energy Act from Ohio sales and use taxes for contractors of the Commission at its Portsmouth and Fernald, Ohio, installations.

The question herein presented will not have important significance for tax liabilities accruing after October 1, 1953, in view of the recent passage by both houses of Congress of legislation repealing, as to liabilities accruing after that date, the exemption conferred by the last sentence of Sec-

tion 9(b) of the Atomic Energy Act of 1946 (P. L. —— 83rd Cong., 1st Sess.). It will, however, continue to control the liability of Commission contractors for taxes accruing prior to that date. The Commission has advised us that the tax liabilities of its contractors and subcontractors under the Washington tax here in issue and the Indiana and Ohio taxes referred to above from the period January 1, 1947-October 1, 1953, will amount to more than $5,500,000.[4] In addition, the Washington court's decision, if not reversed, may serve as the basis for assertion of tax liability in other jurisdictions. It is, therefore, important not only to the United States but to the states as well to determine whether the protection from local taxation afforded the activities of the Atomic Energy Commission by Section 9(b) of the Atomic Energy Act of 1946 is dependent upon the type of tax asserted.

Respectfully submitted,

ROBERT L. STERN,
Acting Solicitor General,
Counsel for the United States.
REUBEN C. CARLSON,
Counsel for General Electric Company.

August 10, 1953.

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[4] The Commission has estimated the tax liabilities as follows:

Washington business and occupation taxes (including taxes assessed against subcontractors whose liability will be controlled by the present case)	$2,265,810
Indiana gross income and gross receipt taxes	1,994,000
Ohio sales and use taxes	1,362,500
Total	$5,622,310

APPENDIX "A"

6 Revised Code of Washington, 1951 (Revenue Act of 1935, Title II, as amended):

DEFINITIONS

* * * * * * *

SEC. 82.04.050 *"Sale at retail," "retail sale."* * * * The term "Sale at retail" or "retail sale" shall include the sale of or charge made for tangible personal property consumed and/or for labor and services rendered in respect to the following: (1) The installing, repairing, cleaning, altering, imprinting, or improving of tangible personal property of or for consumers, excluding, however, services rendered in respect to live animals, birds, and insects; (2) the constructing, repairing, decorating, or improving of new or existing buildings or other structures under, upon, or above real property of or for consumers, including the installing or attaching of any article of tangible personal property therein or thereto, whether or not such personal property becomes a part of the realty by virtue of installation, and shall also include the sale of services or charges made for the clearing of land and the moving of earth to the extent necessary for such constructing or improving, unless the charge therefor is stated separately from other charges made in connection with the work performed, under such rules as the tax commission may prescribe; * * *

* * * * * * *

SEC. 82.04.070 *"Gross proceeds of sales."* "Gross proceeds of sales" means the value proceeding or accruing from the sale of tangible personal property and for services rendered, without any deduction on account of the cost of property sold, the cost of materials used, labor costs, interest, discount paid, delivery costs, taxes, or any other expense whatsoever paid or accrued and without any deduction on account of losses.

SEC. 82.04.110 *"Manufacturer."* "Manufacturer" means every person who, either directly or by contracting with others for the necessary labor or mechanical services,

manufactures for sale or for commercial or industrial use from his own materials or ingredients any articles, substances or commodities. * * *

SEC. 82.04.120 *"To manufacture."* "To manufacture" embraces all activities of a commercial or industrial nature wherein labor or skill is applied, by hand or machinery, to materials so that as a result thereof a new, different or useful article of tangible personal property or substance of trade or commerce is produced and shall include the production or fabrication of special made or custom made articles.

SEC. 82.04.130 *"Commercial use."* "Commercial or industrial use" means the following uses of products, including by-products, by the extractor or manufacturer thereof:

(1) Any use as a consumer; * * *

SEC. 82.04.140 *"Business."* "Business" includes all activities engaged in with the object of gain, benefit, or advantage to the taxpayer or to another person or class, directly or indirectly.

SEC. 82.04.150 *"Engaging in business."* "Engaging in business" means commencing, conducting, or continuing in business and also the exercise of corporate or franchise powers as well as liquidating a business when the liquidators thereof hold themselves out to the public as conducting such business.

* * * * * * *

SEC. 82.04.190 *"Consumer."* "Consumer" means the following:

(1) Any person who purchases, acquires, owns, holds, or uses any article of tangible personal property other than for the purpose of resale as tangible personal property in the regular course of business or for the purpose of consuming such property in producing for sale a new article of tangible personal property or a new substance, * * *

* * * * * * *

(4) Any person who is an owner, lessee or has the right of possession to or an easement in real or personal property

which is being constructed, repaired, improved, cleaned, imprinted, or otherwise altered by a person engaged in business, excluding only the United States, the state and its political subdivisions in respect to labor and services rendered to their real property which is used or held for public road purposes.

* * * * * * *

RATE AND MEASURE OF TAX

SEC. 82.04.220 *Business and occupation tax imposed.* There is levied and shall be collected from every person a tax for the act or privilege of engaging in business activities. Such tax shall be measured by the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be.

* * * * * * *

SEC. 82.04.240 *Tax on manufacturers.* Upon every person * * * engaging within this state in business as a manufacturer; as to such persons the amount of the tax with respect to such business shall be equal to the value of the products, including byproducts, manufactured, multiplied by the rate of one-quarter of one percent.

The measure of the tax is the value of the products, including byproducts, so manufactured regardless of the place of sale or the fact that deliveries may be made to points outside the state.

SEC. 82.04.250 *Tax on retailers.* Upon every person engaging within this state in the business of making sales at retail; as to such persons, the amount of tax with respect to such business shall be equal to the gross proceeds of sales of the business, multiplied by the rate of one-quarter of one percent.

* * * * * * *

DEDUCTIONS IN COMPUTING TAX

SEC. 82.04.430 *Deductions enumerated.* In computing tax there may be deducted from the measure of tax the following items: * * *

(6) Amounts derived from business which the state is prohibited from taxing under * * * the Constitution or laws of the United States; * * *

* * * * * * * *

ADMINISTRATION

* * * * * * * *

SEC. 82.04.450 *Value of products, how determined.* The value of products, including byproducts, extracted or manufactured shall be determined by the gross proceeds derived from the sale thereof whether such sale is at wholesale or at retail, to which shall be added all subsidies and bonuses received from the purchaser or from any other person with respect to the extraction, manufacture, or sale of such products or byproducts by the seller, * * *

* * * * * * * *

SEC. 82.04.500 *Tax not to be passed on.* It is not the intention of this chapter that the taxes herein levied upon persons engaging in business be construed as taxes upon the purchasers or customers, but that such taxes shall be levied upon, and collectible from, the person engaging in the business activities herein designated and that such taxes shall constitute a part of the operating overhead of such persons.

* * * * * * * *

Atomic Energy Act of 1946, c. 724, 60 Stat. 755

SECTION 1. * * *

(b) PURPOSE OF ACT.—It is the purpose of this Act to effectuate the policies set out in section 1(a) by providing, among others, for the following major programs relating to atomic energy:

(1) A program of assisting and fostering private research and development to encourage maximum scientific progress;

(2) A program for the control of scientific and technical information which will permit the dissemination of such information to encourage scientific progress, and for the sharing on a reciprocal basis of information concerning the practical industrial application of atomic energy as soon as

effective and enforceable safeguards against its use for destructive purposes can be devised;

(3) A program of federally conducted research and development to assure the Government of adequate scientific and technical accomplishment;

(4) A program for Government control of the production, ownership, and use of fissionable material to assure the common defense and security and to insure the broadest possible exploitation of the fields; and

(5) A program of administration which will be consistent with the foregoing policies and with international arrangements made by the United States, and which will enable the Congress to be currently informed so as to take further legislative action as may hereafter be appropriate.

(42 U. S. C. 1946 ed., Sec. 1801.)

SEC. 4. * * *

(b) PROHIBITION.—It shall be unlawful for any person to own any facilities for the production of fissionable material or for any person to produce fissionable material, except to the extent authorized by subsection (c).

(c) OWNERSHIP AND OPERATION OF PRODUCTION FACILITIES.—

(1) OWNERSHIP OF PRODUCTION FACILITIES.—The Commission, as agent of and on behalf of the United States, shall be the exclusive owner of all facilities for the production of fissionable material other than facilities which (A) are useful in the conduct of research and development activities in the fields specified in section 3, and (B) do not, in the opinion of the Commission, have a potential production rate adequate to enable the operator of such facilities to produce within a reasonable period of time a sufficient quantity of fissionable material to produce an atomic bomb or any other atomic weapon.

(2) OPERATION OF THE COMMISSION'S PRODUCTION FACILITIES.—The Commission is authorized and directed to produce or to provide for the production of fissionable material in its own facilities. To the extent deemed necessary the Commission is authorized to make, or to continue in effect, contracts with persons obligating them to produce fission-

able material in facilities owned by the Commission. The Commission is also authorized to enter into research and development contracts authorizing the contractor to produce fissionable material in facilities owned by the Commission to the extent that the production of such fissionable material may be incident to the conduct of research and development activities under such contracts. Any contract entered into under this section shall contain provisions (A) prohibiting the contractor with the Commission from subcontracting any part of the work he is obligated to perform under the contract, except as authorized by the Commission, and (B) obligating the contractor to make such reports to the Commission as it may deem appropriate with respect to his activities under the contract, to submit to frequent inspection by employees of the Commission of all such activities, and to comply with all safety and security regulations which may be prescribed by the Commission. Any contract made under the provisions of this paragraph may be made without regard to the provisions of section 3709 of the Revised Statutes (U. S. C., title 41, sec. 5) upon certification by the Commission that such action is necessary in the interest of the common defense and security, or upon a showing that advertising is not reasonably practicable, and partial and advance payments may be made under such contracts. The President shall determine at least once each year the quantities of fissionable material to be produced under this paragraph.

(3) OPERATION OF OTHER PRODUCTION FACILITIES.—Fissionable material may be produced in the conduct of research and development activities in facilities which, under paragraph (1) above, are not required to be owned by the Commission.

(42 U. S. C. 1946 ed., Sec. 1804.)

SEC. 9. (a) The President shall direct the transfer to the Commission of all interests owned by the United States or any Government agency in the following property:

(1) All fissionable material; all atomic weapons and parts thereof; all facilities, equipment, and materials for the processing, production, or utilization of fissionable material or atomic energy; all processes and technical information of

any kind, and the source thereof (including data, drawings, specifications, patents, patent applications, and other sources) relating to the processing, production, or utilization of fissionable material or atomic energy; and all contracts, agreements, leases, patents, applications for patents, inventions and discoveries (whether patented or unpatented), and other rights of any kind concerning any such items;

(2) All facilities, equipment, and materials, devoted primarily to atomic energy research and development; and

(3) Such other property owned by or in the custody or control of the Manhattan Engineer District or other Government agencies as the President may determine.

(b) In order to render financial assistance to those States and localities in which the activities of the Commission are carried on and in which the Commission has acquired property previously subject to State and Local taxation, the Commission is authorized to make payments to State and local governments in lieu of property taxes. Such payments may be in the amounts, at the times, and upon the terms the Commission deems appropriate, but the Commission shall be guided by the policy of not making payments in excess of the taxes which would have been payable for such property in the condition in which it was acquired, except in cases where special burdens have been cast upon the State or local government by activities of the Commission, the Manhattan Engineer District or their agents. In any such case, any benefit accruing to the State or local government by reason of such activities shall be considered in determining the amount of the payment. The Commission, and the property, activities, and income of the Commission, are hereby expressly exempted from taxation in any manner or form by any State, county, municipality, or any subdivision thereof.

(42 U.S.C. 1946 ed., Sec. 1809.)

SEC. 12. (a) In the performance of its functions the Commission is authorized to—

* * * * * * *

(5) Acquire such materials, property, equipment, and facilities, establish or construct such buildings and facilities, and modify such buildings and facilities from time to time as it may deem necessary, and construct, acquire, provide, or arrange for such facilities and service (at project sites where such facilities and services are not available) for the housing, health, safety, welfare, and recreation of personnel employed by the Commission as it may deem necessary;

* * * * * * *

(42 U.S.C. 1946 ed., Sec. 1812.)

SEC. 15. (a) There is hereby established a Joint Committee on Atomic Energy to be composed of nine Members of the Senate to be appointed by the President of the Senate, and nine Members of the House of Representatives to be appointed by the Speaker of the House of Representatives. In each instance not more than five members shall be members of the same political party.

(b) The joint committee shall make continuing studies of the activities of the Atomic Energy Commission and of problems relating to the development, use, and control of atomic energy. The Commission shall keep the joint committee fully and currently informed with respect to the Commission's activities. All bills, resolutions, and other matters in the Senate or House of Representatives relating primarily to the Commission or to the development, use, or control of atomic energy shall be referred to the joint committee. The members of the joint committee who are Members of the Senate shall from time to time report to the Senate, and the members of the joint committee who are Members of the House of Representatives shall from time to time report to the House, by bill or otherwise, their recommendations with respect to matters within the jurisdiction of their respective Houses which are (1) referred to the joint committee or (2) otherwise within the jurisdiction of the joint committee.

(42 U.S.C. 1946 ed., Sec. 1815.)

SEC. 17. The Commission shall submit to the Congress, in January and July of each year, a report concerning the activities of the Commission. The Commission shall include

in such report, and shall at such other times as it deems desirable submit to the Congress, such recommendations for additional legislation as the Commission deems necessary or desirable.
(42 U.S.C. 1946 ed., Sec. 1817.)

APPENDIX "B"

SUPERIOR COURT OF THURSTON COUNTY

(Caption omitted)

MEMO. OPINION

WRIGHT, *J.*:

It has been uniformly held that contractors in positions similar to that of plaintiff are independent contractors and this Court holds specifically that plaintiff is an independent contractor and not an agent of the commission and that except for the Atomic Energy Act, the rule of *Alabama* vs. *King & Boozer*, 314 U. S. would apply.

The act, however, has brought into this case a problem which presents genuine difficulty. The Court believes that the intent of congress was to exempt from taxation the contractor such as plaintiff. Any other result would make the legislation meaningless. The commission, its property and its income are exempt from taxation without legislation and it will not be presumed that congress did a vain, or useless thing. The major activities of the commission are, and congress well knew would be, carried on through independent contractors.

The plaintiff should prevail.

SUPERIOR COURT OF THE COUNTY OF THURSTON

(Caption omitted)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

WRIGHT, *J.*:

The above-entitled cause came on regularly for trial on the 12th day of April, 1949, before the Court sitting without a

jury, no jury having been requested, Reuben C. Carlson, Howard Carothers and Berryman Green, appearing for the plaintiff, and Jess N. Rosenberg, Max Kaminoff, William Kleon and C. John Newlands, appearing for the defendant; and evidence both oral and documentary having been introduced and Briefs having been submitted by counsel for both parties, and the Cause submitted for decision, the Court now makes its Findings of Fact, as follows:

Findings of Fact

I

The plaintiff, General Electric Company, a New York Corporation, has paid all fees required by law and is in all respects qualified to do business within the State of Washington. That plaintiff, on or about September 1, 1946, in the Counties of Benton, Franklin, Yakima and Grant all in the State of Washington, entered upon the performance of a pure cost Contract with the United States of America, dated May 15, 1946, and effective that date, and known, numbered and lettered as Contract No. W-31-109 eng-52, known in this Cause as Plaintiff's Exhibit No. 3.

II

That on or about August 16, 1944, the Manhattan Engineer District came into being, by special order of the War Department, charged with the responsibility of developing the atomic bomb. This involved a tremendous amount of research, construction of a large construction plant and various installations throughout the country, and the ultimate assembly of the finished product, the bomb.

III

That E. I. duPont deNemours & Company, built, managed and operated for the Manhattan Engineer District, the Hanford Engineer Works, a federally owned project for the production of fissionable materials, now known as Hanford Engineer Works.

IV

That upon the termination of World War II, the duPont Company, as provided in its Contract, requested that it be relieved from the operation of the Hanford Engineer Works and its Contract. That it became necessary for the Manhattan Engineer District to obtain a new operator qualified to succeed the duPont Company and take on the operation of the project. That the continuation of the work was vital to the national welfare, security, and defense; therefore, acting pursuant to and in accordance with delegations of authority under the Act of Congress of December 18, 1941 (Public Law No. 354, 77th Congress), known as the First War Powers Act of 1941, which provided for the Executive Branch of the Federal Government to enter into certain contractual arrangements for the purpose of expediting and furthering prosecution of the war, the Manhattan Engineer District, Corps of Engineers, War Department, entered into the hereinabove set forth Contract with the plaintiff, General Electric Company, on May 15, 1946. This Contract was subsequently formally adopted by the United States Atomic Energy Commission on January 28, 1947.

V

That in the course of performance required by the Contract, the plaintiff was required to and did expend large sums of money from funds created by advances and current reimbursements thereto from the United States of America and money collected on behalf of the United States from private persons, firms and corporations, which monies were applied to the performance of the Contract, and plaintiff has continued to receive such reimbursements throughout the entire period of performance.

The Plaintiff Contractor was not and is never required to utilize its own funds. The tax collected by the State has been measured by the total amount of reimbursements for labor and materials, that is, the cash paid into Plaintiff's account by the United States, the funds received by the Plaintiff from third parties and deposited in the account, and credits received through payroll deductions. From the

fund so created the Plaintiff pays the salaries of its employees, the cost of materials procured for the work and any and all other expenses incurred under the Contract.

VI

That from the date of the Plaintiff's entry upon the performance of the Contract, and continuously since, the Tax Commission of the State of Washington has held that the amounts received by Plaintiff (as hereinbefore set forth), are includable in its gross income for the purpose of computing the measure of the tax payable under the provisions of Title II of the Revenue Act of 1935, as amended, entitled Business and Occupation Tax, being Section 8370-4 to and including Section 8370-15 of Remington's Revised Statutes of Washington, as amended to date, and has demanded of Plaintiff payment in full of the tax so levied.

VII

That Plaintiff, in compliance with the demands of the Tax Commission of the State of Washington, and solely in order to avoid penalties, has paid in full and at the times and in the amounts and for the periods hereinafter set out the business and occupation taxes determined and held to be due by the Tax Commission of the State of Washington, as follows:

Date of Payment	Period Covered	Business and Occupation Tax
	1946	
February 5, 1947	September & October	$ 2,931.38
February 5, 1947	November & December	6,034.17
	1947	
March 19, 1947	January & February	12,500.74
May 21, 1947	March & April	10,531.22
July 30, 1947	May & June	11,235.59
September 24, 1947	July & August	13,921.23
December 2, 1947	September & October	16,557.59
February 6, 1948	November & December	29,684.91
	1948	
April 2, 1948	January & February	41,013.75
June 7, 1948	March & April	60,480.53
August 11, 1948	May & June	63,573.53
October 15, 1948	July & August	62,348.53
December 17, 1948	September & October	55,908.14
February 9, 1949	November & December	74,841.29

The aggregate amount so paid by the plaintiff to the Tax Commission of the State of Washington on account of business and occupation taxes measured by reimbursements made to it by the United States of America, prior to the bringing of the within action was Four Hundred Sixty-Two Thousand, Three Hundred Twenty-Nine and 46/100 Dollars ($462,329.46).

It has been stipulated that the following additional amounts of said tax have been paid:

Date of Payment	Period Covered	Business and Occupation Tax
	1949	
April 19, 1949	January & February	$ 66,226.78
June 16, 1949	March & April	51,082.07
August 18, 1949	May & June	41,901.98
October 14, 1949	July & August	32,182.50
December 16, 1949	September & October	21,574.92
February 15, 1950	November & December	20,144.01
	1950	
March 23, 1950	January & February	16,333.03
June 2, 1950	March & April	21,801.84
August 11, 1950	May & June	23,100.44
October 13, 1950	July and August	24,145.86
December 18, 1950	September & October	27,294.22
February 19, 1951	November & December	28,857.50
	1951	
April 9, 1951	January & February	34,924.74
May 23, 1951	March & April	29,749.01
July 16, 1951	May & June	44,471.20
		$485,760.19

The Court finds that said amounts should be included within a Judgment herein, pursuant to said Stipulation.

VIII

That under its Contract the Plaintiff was obligated to:

1. Manage and operate all the fissionable material production facilities of the project.

2. Manage and operate the Village of Richland and the construction camp community at North Richland, providing all necessary municipal facilities and services at Government expense and serving as agent for the Government for all real estate which comprises the communities.

3. Construct or provide for the construction of all plants and facilities needed for manufacturing processes and facilities related thereto and construct or provide for the construction of residential communities and other facilities necessary for the functioning of the communities.

4. Provide all architect-engineer services in connection with the foregoing.

5. Conduct development and research relative to production of fissionable materials.

IX

That under the terms, covenants and conditions of said Contract the Plaintiff is to be reimbursed for all costs of whatever nature incurred under the Contract, and to receive as its sole payment at the completion of the Contract a fixed fee of One Dollar ($1.00).

X

That by virtue of the terms of the Atomic Energy Act of 1946, as amended, and the Contract, all property and equipment utilized by the Plaintiff in the production and construction contemplated under the Contract, title to all drawings, designs and specifications created under the Contract and complete control over the product, and all its component parts, while in process and after manufacture, vests in the Atomic Energy Commission, and patents to all processes and designs conceived or developed under the Contract are owned by the Atomic Energy Commission or are assignable to it, if the Atomic Energy Commission desires.

XI

That the Plaintiff prepares preliminary studies, final designs, cost estimates, supervises all construction work, makes appropriate field tests, submits progress reports, and performs all other architectural and engineering services required by the Contract, either subject to the approval or at the direction of the Atomic Energy Commission.

XII

That the Atomic Energy Commission reserves the right to furnish any or all of the materials and equipment in accordance with the Contract.

XIII

That the Plaintiff must obtain the prior approval or ratification of the Atomic Energy Commission for all purchases or contracts over Five Thousand Dollars ($5,000.00), (and in the case of construction over Two Thousand Dollars ($2,000.00)).

XIV

1. That the Plaintiff is required to get approval of the Atomic Energy Commission before purchasing or utilizing materials, supplies, and equipment of its own manufacture, when the price is Two Hundred Fifty Dollars ($250.00), or over.

2. That the Hanford Operations Office of the Atomic Energy Commission at all times maintains constant supervision of the Plaintiff's actions in the performance of the Contract.

3. That the Plaintiff is subject to the administrative and technical procedures prescribed by the Atomic Energy Commission in the construction, operation and research phases of the Contract.

4. That the Atomic Energy Commission has the right to pay directly to third parties all sums due for labor, material and other charges arising from the Contract.

5. That all construction subcontracts are subject to the approval of the Atomic Energy Commission.

6. That all subcontracts for the operation, research development, and production processes require the prior approval or ratification of the Atomic Energy Commission.

7. That production schedules are prescribed by the Atomic Energy Commission.

8. That all work and services of the Plaintiff under the terms of the Contract are subject in all respects to the approval of the Atomic Energy Commission.

XV

That the area known as the Hanford Works, which is the situs of the Plaintiff's operation and performance of the Contract, was obtained by the Government for the sole purpose of constructing and operating the Government's atomic energy plant. Certain basic requirements make the area geographically desirable. The Government acquired by purchase or condemnation all of the land, something in excess of 400,000 acres, on which the communities and plants were built. Although the Government did not take exclusive jurisdiction of the area, all unauthorized persons are excluded from the area, with the exception of the village of Richland and the community of North Richland. All ingress and egress of people is controlled and only permitted to those with official business who have obtained security clearance in accordance with the requirements of Section 10 of the Atomic Energy Act. In addition to the controls on the ground that have been established by Public Proclamations 18 and 28, dated July 14, 1943, and November 12, 1946, respectively, issued by the Commanding Officer, Western Defense Command and by Headquarters, Sixth Army, respectively, the President of the United States on January 17, 1948, by Executive Order No. 9925 established air space reservation over the Hanford Works at Richland, Washington. Thus, complete control by the Government over the area is exercised. Practically all of the buildings on the land comprising the area known as the Hanford Works, including the village of Richland, were either built for, have been purchased by, or belong to the Government.

XVI

That Plaintiff performs all the municipal activities for the area included within the Hanford Works, particularly for the community of Richland. It constructs roads necessary for the prosecution of the work and maintains these roads. Further, the General Electric Company, at the direction of the Government, has provided school facilities, police and fire protection, sewage, lighting, town bus system,

dormitories, and a hospital, all of which are Government-owned. The Plaintiff manages and maintains housing facilities in the Hanford Works area and grants licenses and leases to persons, firms and corporations for the operation of businesses and commercial enterprises for the benefit of personnel located on or connected with the project. The General Electric Company collects the revenue from such license and lease arrangements for and on behalf of the Government. Under its Contract, the General Electric Company provides these services and executes the necessary contracts for housing, licenses, leases and concessionaire agreements as agent of the Government. The Plaintiff has so acted at all times in its management of the Government properties and received reimbursements therefor, which are asserted by the Defendant to be taxable under the Washington State Business and Occupation Tax (Rule 223, Rules Relating to the Revenue Act). The General Electric Company owns none of the real or personal property which it operates and manages in the performance of its Contract.

XVII

That all property, materials (with the exception of fissionable materials), supplies and equipment are procured by the General Electric Company for use under the Contract, title to which vests in the Government at the same time and place as it vests in the General Electric Company, and the contractor is required to suitably mark all property so acquired in a special manner that clearly indicates that the items are the property of the Government. All procurement and procedures therein are approved by the Government.

XVIII

That the price and other terms and conditions of sale of any materials or equipment manufactured by the General Electric Company and used on the project are subject to the approval of the Government. The vendors of material purchased by the General Electric Company are paid by checks drawn on the revolving fund.

XIX

That the Contract also authorizes the General Electric Company to lease, transfer or otherwise dispose of such Government-owned property in its possession to such persons upon the terms and conditions as may be approved or ratified by the contracting officer, and the proceeds of such leases, transfers or dispositions are applied in the reduction of the cost of the work under the Contract.

XX

That the Contract is to be performed entirely at the expense of the Government and the contractor is not to be liable for and the Government shall indemnify and hold the contractor harmless against any delay, failure, loss, expense (including the expense of litigation) or damage (including personal injuries and deaths of persons and damage to property) of any kind and for any cause whatsoever arising out of or connected with the work and whether or not any employee or employees of the contractor is responsible therefor, unless such delay, failure, loss, expense or damage has been established by the Government to have been caused directly by bad faith or wilful misconduct on the part of certain named corporate officers of the contractor within the scope of his or their authority and employment. This provision, which is an extraordinary provision in Government contracts, was approved by the President of the United States as it originally appeared in the contract between the duPont Company and the Manhattan Engineer District. Further, it is provided that the Government shall assume and carry on the defense of all claims, suits or legal proceedings which might be asserted against the contractor on account of acts or omissions in the performance of the work, and that the Government shall pay directly and discharge completely all final judgments entered against the contractor in such litigation or claims which are settled by agreement approved by the contracting officer.

XXI

That salaries and expenses of the company's employees are paid by the Government. These salaries are subject to

the approval of the contracting officer. When, in the opinion of the contracting officer, the Plaintiff's personnel or overhead is excessive for the proper performance of the Contract, reductions are to be made as required by the contracting officer, subject to the right of appeal by the contractor pursuant to the "Disputes" articles of the Contract.

XXII

That the contractor is required to dismiss employees deemed by the Government to be incompetent, careless, insubordinate, or whose continued employment is deemed to be inimical to the public interest.

XXIII

That under the Contract, the General Electric Company operates units for the production of fissionable materials at capacity or on such other scale as required by the contracting officer. In order that this can be accomplished, the contractor has to procure and train the necessary personnel and the extent and character of the training is subject to the approval of the contracting officer.

XXIV

That under the Contract the General Electric Company provides the personnel and certain technical experience and the Government provides the facilities, money, and upon consultation with the contractor, formulates the policies and programs to be carried out, subject to the controls under the program by the Executive and Legislative Branches of the Government as set forth in the Atomic Energy Act. The actual plant operations are carried on by the employees of the Plaintiff under the general supervision of the Government, and subject to and in accordance with policies and instructions from the Government. At all times there is a very close coordination between the General Electric Company and the Government.

XXV

That all practices and procedures, safety regulations and other preventive measures directed at the health hazards

inherent in the production of radioactive materials are prescribed or approved by the Government and the standards of exposure followed in the plant areas are approved by the Government.

The fissionable materials used in the operation of the plant are procured and furnished by the Government and their use carefully and systematically controlled and accounted for under the direction and supervision of the Government.

XXVI

That in conformity with the statutes of the State of Washington, this Plaintiff in due time filed with the Tax Commission of the State of Washington, its petitions, in writing, for refund of the taxes paid by it and hereinabove set out, and in conformity with the statutes of the State of Washington, and in due time as prescribed in those statutes, the Tax Commission of the State of Washington conducted hearings upon the petitions for refund filed by the Plaintiff as aforesaid, and on April 1, 1949, entered its order denying the refund to this Plaintiff of the taxes paid by it as above set out, and on April 1, 1949, the Tax Commission of the State of Washington duly notified the Plaintiff of its order denying refund as aforesaid.

XXVII

That counsel have stipulated that the amounts hereinbefore set forth, paid subsequent to February 9, 1949, should abide by the judgment of the Court herein, and are entitled to be included in the Judgment in this Cause.

From the foregoing Findings of Fact, the Court draws the following

Conclusions of Law:

I

Plaintiff is an independent contractor, and not an agent of the Atomic Energy Commission.

II

That plaintiff is not entitled to a refund with respect to taxes paid for business conducted between September 1,

1946, and January 1, 1947, by reason of the fact that it was an independent contractor with the United States Government, and in the absence of any statutory provision enacted by Congress immunizing such contractor, the business and occupational tax applies.

III

Under Sections 189 and 199, Ch. 180, Laws of 1935, as amended, plaintiff is entitled to recover Judgment against defendant in the amount of all taxes paid for business conducted on and after January 1, 1947, as set forth in the foregoing Findings of Fact, pursuant to the finding of this Court that the taxes were deductible under Section 12F, Ch. 180, Laws of 1935, as amended.

IV

Section 9B of the Atomic Energy Act of 1946 immunizes Plaintiff as an independent contractor with the Atomic Energy Commission from the payment of business and occupational taxes to the State of Washington, with respect to its reimbursements received in connection with the performance of its contract with the Atomic Energy Commission.

V

That by reason of the foregoing, Plaintiff is entitled to have and recover judgment against the defendant in the sum of Nine Hundred Thirty-Eight Thousand, Four Hundred Thirty-Seven and 25/100 Dollars ($938,437.25), together with interest at the rate of three per cent (3%), until paid, on the sum of Four Hundred Seventeen Thousand, Five Hundred Twenty-Three and 41/100 Dollars ($417,523.41), this being the amount of the aforesaid taxes paid subsequent to May 1, 1949, together with such costs as are allowable by law.

Done in open Court, this 8th day of October, 1951.

APPENDIX "C"

SUPREME COURT OF WASHINGTON

(Caption omitted)

GRADY, *C. J.*:

This action was instituted by General Electric Company to recover from the state of Washington the sum of $938,437.25, with interest, representing business and occupation taxes paid. The court entered a judgment for the amount claimed. The state of Washington has taken this appeal.

Some years ago the United States constructed a plant at Hanford, Washington, for the manufacturing of fissionable material. In 1943, a contract was made with E. I. duPont de Nemours and Company, Inc., a foreign corporation authorized to do business in the state of Washington, to carry on the manufacturing activity. The contract was negotiated and executed pursuant to the First War Powers Act of 1941. The question of liability to the state of Washington for the payment of business and occupation taxes was considered. The record indicates the corporation was seeking ways and means whereby in the performance of its contract with the United States it might be able to avoid payment of such taxes. A suggested method was the insertion in the contract of an agency clause, but this was not done. The thought was expressed that the attendant difficulties would more than offset the comparatively small tax saving involved.

The corporation and the United States sought a ruling from the state tax commission upon the question whether in performing its contract the corporation would be engaged in such a business activity that it would be amenable to the business and occupation tax, and also whether in the performance of the contract it would be an instrumentality or agency of the United States. It was recognized that the performance by a private corporation of a contract with the United States did not grant it immunity from a business and occupation tax, and the reason assigned was that the incidence or impact of the tax was not upon the operations

of the corporation as an agency or instrumentality of the United States, but upon the corporation in its private capacity. It appears from the record that this recognition was based upon rules pronounced in Silas Mason Co. v. Tax Commission, 302 U. S. 186, 82 L. Ed. 187, and James v. Dravo Contracting Co., 302 U. S. 134, 82 L. Ed. 155. The tax commission made a ruling that the corporation would not be an agency or instrumentality of the United States in the performance of its contract, would not be immune from such tax, and that it would be engaged in a business activity within the meaning and intent of Laws of 1935, chapter 180, p. 706, as amended (RCW 82.04).

Respondent is the successor of the duPont company. It is a foreign corporation, is authorized to transact business in this state, and is normally subject to its business and occupation tax. As a part of its business, the corporation manufactures fissionable material and uses specially constructed facilities owned by the United States.

The following statutes are a part of our business and occupation tax laws:

> "'Business' includes all activities engaged in with the object of gain, benefit, or advantage to the taxpayer or to another person or class, directly or indirectly." (RCW 82.04.140).
>
> "'Engaging in business' means commencing conducting, or continuing in business and also the exercise of corporate or franchise powers as well as liquidating a business when the liquidators thereof hold themselves out to the public as conducting such business." (RCW 82.04.50).
>
> "'Manufacturer' means every person who, either directly or by contracting with others for the necessary labor or mechanical services, manufactures for sale or for commercial or industrial use from his own materials or ingredients any articles, substances or commodities. When the owner of equipment or facilities furnishes, or sells to the customer prior to manufacture, all or a portion of the materials that become a part of whole of the manufactured article, the tax commission shall

prescribe equitable rules for determining tax liability." (RCW 82.04.110).

" 'To manufacture' embraces all activities of a commercial or industrial nature wherein labor or skill is applied, by hand or machinery, to materials so that as a result thereof a new, different or useful article of tangible personal property or substance of trade or commerce is produced and shall include the production or fabrication of special made or custom made articles." (RCW 82.04.120).

In September 1946, respondent entered into a contract with the United States pursuant to the authority given by the First War Powers Act of 1941. In June 1947, respondent and the United States made a supplemental contract pursuant to authority given to the latter by the Atomic Energy Act of 1946 (Public Law No. 585, 79th Congress, 60 Stat. 755, 765, 766, 42 U. S. C. A. 803, 819, 820, Sec. 1809(b)). The courts of this state have been asked in this action to construe the contract between respondent and the United States and determine whether one of the activities in which the respondent is engaged, the manufacturing of fissionable material, is that of the Atomic Energy Commission or its own activity.

Because of the secrecy necessarily surrounding the manufacturing process in which respondent is engaged, it has agreed in its contract to submit to many contractual conditions with reference to supervision by government agents in the purchase of supplies and equipment, in fiscal affairs and in many other respects not necessary to set forth, none of which, however, are inconsistent with or change the status of respondent as one engaged in business as a manufacturer, as defined by statute.

It is the contention of respondent that, by the terms of its contract with the United States, a relationship has been created whereby it must be said that the manufacturing business in which it is engaged is that of the governmental agency, and, therefore, it is immune from the business and occupation tax by virtue of Sec. 9(b) of the Atomic Energy Act of 1946. The part of Sec. 9(b) relied upon reads:

"The Commission, and the property, activities, and income of the Commission, are hereby expressly exempted from taxation in any manner or form by any State, county, municipality, or any subdivision thereof . . ."

The respondent cites and relies upon the cases of Roane-Anderson Co. v. Carson, 192 Tenn. 150, 239 S. W. (2d) 27, and Carson v. Roane-Anderson Co., 342 U. S. 232, 96 L. Ed. 257. We do not think the statute or the cited cases meet the question we have before us in this case, or that we should feel bound by the decision of the United States supreme court. In that case and the Tennessee case being reviewed, sales and use taxes were involved. The Tennessee court found as a fact that the goods sold and purchased became the property of the government and were in reality paid for by government money; hence, they were not subject to the Tennessee sales and use tax. The United States supreme court accepted the findings of fact made by the Tennessee court and affirmed its judgment. The supreme court of Arkansas has recently decided in a similar case that if the contractor is the purchaser of the goods, a sales tax is collectible; but if the United States is such purchaser, the taxes are not collectible; also, that who is the purchaser of the goods, is a question to be determined by state law, upon which subject only the courts of the state can speak with final authority. Parker v. Kern-Limerick, Inc., ——Ark. ——, 254 S. W. (2d) 454. The court cited Alabama v. King & Boozer, 314 U. S. 1, 86 L. Ed. 3, holding to the same effect.

The questions before us are purely domestic and must be determined by a construction of the contract and the application of our statutes. The part of the Atomic Energy Act above quoted is not before us for construction or application and does not affect respondent or appellant. The governmental agency is not carrying on any activity in connection with the manufacturing business of respondent, and therefore Sec. 9(b) of the act has nothing to do with the legal questions we have under consideration. The incidence or impact of the tax falls only on respondent as a busi-

ness corporation and not as an agency or instrumentality of the United States. The act does not in any way attempt to affect the operation of the business and occupation tax upon those who engage in manufacturing in this state, even though they may do so pursuant to a contract with the United States. If it did so, a very serious constitutional question involving the power of the United States to restrict the right of this state to impose such a tax upon those who exercised the privilege of doing business within its borders would be raised.

The manufacturing of fissionable material by respondent is done by it, not as an agent or instrumentality of the United States, but as a part of its authorized corporate functions. The Taxpaying status of respondent must be determined by our statutes, and not by any status or relationship attempted to be created by contract. It is the nature of the business done by respondent in this state that must determine its taxpaying status and not what it may denominate itself in its contract. The adroit use of words and phrases in the contract by which it is sought to establish a relationship between itself and the governmental agency whereby its manufacturing business and activity can be said to be that of the agency is of no avail.

Reduced to its simplest form, we have a business corporation engaged in manufacturing a high explosive and delivering its product to a governmental agency. Our statute authorizes the imposition of a business and occupation tax for the privilege of carrying on such an activity in this state. The facts that respondent uses buildings and facilities of the agency, that by contract it has submitted to certain supervision, and that special fiscal arrangements are provided for, do not make such activities those of the governmental agency, nor do they make respondent such an instrumentality of the United States or of the agency that it is immune, expressly or impliedly, from the business and occupation tax.

The reasoning of the court in the case of Carson v. Roane-Anderson Co., 342 U. S. 232, 96 L. Ed. 257, and in Roane-Anderson Co. v. Carson, 192 Tenn. 150, 239 S. W. (2d) 27, is unsound when applied to the situation presented by

the record in this case. We find no reason based either on Sec. 9(b) of the Atomic Energy Act or the foregoing cases to depart in any way from what we decided in Mason, Inc., v. State Tax Comm., 188 Wash. 98, 61 P. (2d) 1269. The constitutional right of the state of Washington to exact a business and occupation tax from a corporation given the privilege of doing business within its boundaries and having a contract with the United States was sustained on appeal. Silas Mason Co. v. Tax Commission, 302 U. S. 186, 82 L. Ed. 187.

The judgment is reversed and the case remanded for the entering of an order dismissing the action.

FINLEY, J. (dissenting):—Section 9(b) of the atomic energy act of 1946 (Public Law No. 585, 79th Congress, 60 Stat. 755, 765, 766, 42 U. S. C. A. 803, 819, 820, Sec. 1809(b), in part, reads:

> "The Commission, and the property, *activities*, and income of the Commission, are hereby expressly *exempted from taxation in any manner or form* by any State, County, municipality, or any subdivision thereof . . ." (Emphasis supplied).

Italicized and mentioned particularly here at the start of this discussion is the fact that the exemption from taxation, contemplated by Sec. 9(b), is from *"taxation in any manner or form by any State, county, municipality, or any subdivision thereof."* Of even further significance is the decision of the United States supreme court in *Carson* v. *Roane-Anderson Co.*, 342 U. S. 232, 96 L. Ed. Adv. Opin. 198, and its controlling effect here respecting disposition of the instant appeal. In *Carson*, the court, in the broadest of languages, recently construed Sec. 9(b), and invalidated a Tennessee sales and use tax (as applied to certain taxpayers) on the ground that activities of the atomic energy commission were involved.

The question in the instant case is whether the above legislation *prevents imposition of the business and occupation tax* of the state of Washington upon the General Electric Company, a New York corporation. The tax is occa-

sioned and its amount is measured, in effect, by the corporation's operations in this state (pursuant to its contract with the atomic energy commission), *as the operator of the atomic energy plant at Hanford, Washington, and the related facilities thereof for the United States Government.*

The majority opinion brushes aside any suggestion that Sec. 9(b) and the Carson case are controlling. It is said that the instant case must be decided on the basis of state statutes, and that no Federal statute is involved. This I cannot follow or understand. I certainly recognize the general principle—that interpretations of state statutes by the supreme court of this state are controlling, under certain circumstances. However, this assumes the absence of any applicable valid Federal statute, power or authority. Applying the above general principle is begging the question, if, in fact, a valid Federal statute is applicable. Here in the instant case, it seems crystal clear to me that Sec. 9(b) does apply; particularly, because of the manner in which it has been construed in the *Carson* case. The majority cite and rely upon *Silas Mason Co.* v. *Tax Commission*, 302 U. S. 186, 82 L. Ed. 187, in support of the proposition that the state of Washington can constitutionally impose its business and occupation tax upon a corporation doing business in the state in the performance of a contract with the United States government. I have no quarrel with the *Mason* case whatsoever. But in the instant case, something new has been added—namely, the enactment of Sec. 9(b), and the assertion thereby of a Federal power, absent in the *Mason* case. It appears to me that the *Mason* case is distinguishable, and that it simply is not applicable to the instant case. *Parker* v. *Kern-Limerick, Inc.*, —— Ark. ——, 254 S. W. (2d) 454, is cited by the majority. Basically, the *Parker* case is subject to the same analysis and criticism as the majority opinion herein.

Now to get back to some further pertinent, explanatory facts. The corporation is in all respects qualified to do business within the state of Washington. Its contract with the government was (1) entered into on May 15, 1946, under authority of the First War powers act, 1941 (Public Law No. 354, 77th Congress, Dec. 18, 1941); (2) subsequently,

formally approved and adopted by the atomic energy commission on January 28, 1947, under authority granted to the commission by the atomic energy act of 1946. The superior court for Thurston county held that § 9(b) prohibited imposition of the tax. Judgment was entered, ordering the state to refund the tax paid by the corporation in the sum of $938,437.25, plus interest thereon. The state of Washington has appealed.

For a variety of reasons, the costs of government have rocketed to astronomic levels in recent years. Without debating the "pros" or "cons" of this economic phenomenon of modern life, it can be said quite impartially, and with little fear of contradiction, that the problems of finding sources of revenue, ways and means of imposing and collecting taxes to meet the costs of government, have become most difficult. This is particularly true at the state and other local levels of government. Overlapping and duplication, double, or perhaps treble, taxation with respect to particular items of property, and competition for tax revenue between taxing authorities, complicate matters further and to a very considerable degree. In this setting, the instant case comes to this court. Apparently, the Federal Government is concerned, and legal counsel for the United States government have sought to assist respondent corporation in escaping liability for payment of the tax. The amount presently involved is significant. Future and further implications are even more significant. The state of Washington is concerned and quite naturally is resisting this potential loss of tax revenue.

As an abstract proposition, our interest and sympathy may support the official policy taken in this matter by the state of Washington. However, it is obviously the duty of this court to decide the case on the basis of legal principles —personal inclinations, sympathies, or interests to the contrary, notwithstanding.

The potential loss of tax revenue to the state of Washington is serious. It would be even more shocking, except for the fact that the state does benefit tax-wise in other respects most significantly, as a result of the operations of the Federal government's atomic energy plant at Hanford, Wash-

ington. Among other things to be noted is the large personnel payroll, most of which is expended by employees in this state for cost-of-living items and for other lesser luxuries which they can afford. The circulation of this payroll, its momentum and impact upon our total sales and other tax revenues, is considerable.

Counsel for respondent concede the status of the corporation is that of an independent contractor. But the provisions of the contract could be construed to place respondent in the category of an agent of the Federal government. It can be readily seen that the contract between the respondent corporation and the government provides for the strictest supervision by the atomic energy commission of work done, acts performed, and services rendered by the corporation in its performance of obligations required of it under the contract. In connection with this aspect of the matter, certain findings of the trial court seem most significant. These are quoted at some length, as follows:

"V. That in the course of performance required by the Contract, the Plaintiff was required to and did expend large sums of money from funds created by advances and current reimbursement thereto from the United States of America and money collected on behalf of the United States from private persons, firms and corporations, which monies were applied to the performance of the Contract, and Plaintiff has continued to receive such reimbursements throughout the entire period of performance.

"The Plaintiff Contractor was not and is never required to utilize its own funds. The tax collected by the State has been measured by the total amount of reimbursements for labor and materials, that is, the cash paid into Plaintiff's account by the United States, the funds received by the Plaintiff from third parties and deposited in the account, and credits received through payroll deductions. From the fund so created the Plaintiff pays the salaries of its employees, the cost of materials procured for the work and any and all other expenses incurred under the contract.

"VI. That from the date of the Plaintiff's entry upon the performance of the Contract, and continuously since, the Tax Commission of the State of Washington has held that

the amounts received by Plaintiff (as hereinbefore set forth), are includable in its gross income for the purpose of computing the measure of the tax payable under the provisions of Title II of the Revenue Act of 1935, as amended, entitled Business and Occupation Tax, being Section 8370-4 to and including Section 8370-15 of Remington's Revised Statutes of Washington, as amended to date, and has demanded of Plaintiff payment in full of the tax so levied.

". . .

"VIII. That under its Contract the Plaintiff was obligated to:

"1. Manage and operate all the fissionable material production facilities of the project.

"2. Manage and operate the Village of Richland and the construction camp community at North Richland, providing all necessary municipal facilities and services at Government expense and serving as agent for the Government for all real estate which comprises the communities.

"3. Construct or provide for the construction of all plants and facilities needed for manufacturing processes and facilities related thereto and construct or provide for the construction of residential communities and other facilities necessary for the functioning of the communities.

"4. Provide all architect-engineer services in connection with the foregoing.

"5. Conduct development and research relative to production of fissionable materials.

"IX. That under the terms, covenants and conditions of said Contract the Plaintiff is to be reimbursed for all costs of whatever nature incurred under the Contract, and to receive as its sole payment at the completion of the Contract a fixed fee of One Dollar ($1.00).

"X. That by virtue of the terms of the Atomic Energy Act of 1946, as amended, and the Contract, all property and equipment utilized by the Plaintiff in the production and construction contemplated under the Contract, title to all drawings, designs and specifications created under the Contract and complete control over the product, and all its component parts, while in process and after manufacture, vests in the Atomic Energy Commission, and patents to all proc-

esses and designs conceived or developed under the Contract are owned by the Atomic Energy Commission or are assignable to it, if the Atomic Energy Commission desires.

"XI. That the Plaintiff prepares preliminary studies, final designs, cost estimates, supervises all construction work, makes appropriate field tests, submits progress reports, and performs all other architectural and engineering services required by the Contract, either subject to the approval or at the direction of the Atomic Energy Commission.

"XII. That the Atomic Energy Commission reserves the right to furnish any or all of the materials and equipment in accordance with the Contract.

"XIII. That the Plaintiff must obtain the prior approval or ratification of the Atomic Energy Commission for all purchases or contracts over Five Thousand Dollars ($5,000.00), (and in the case of Construction over Two Thousand Dollars ($2,000.00)).

"XIV. 1. That the Plaintiff is required to get approval of the Atomic Energy Commission before purchasing or utilizing materials, supplies, and equipment of its own manufacture, when the price is Two Hundred Fifty Dollars ($250.00), or over.

"2. That the Hanford Operations Office of the Atomic Energy Commission at all times maintains constant supervision of the Plaintiff's actions in the performance of the Contract.

"3. That the Plaintiff is subject to the administrative and technical procedures prescribed by the Atomic Energy Commission in the construction, operation and research phases of the Contract.

"4. That the Atomic Energy Commission has the right to pay directly to third parties all sums due for labor, material and other charges arising from the Contract.

"5. That all construction subcontracts are subject to the approval of the Atomic Energy Commission.

"6. That all subcontracts for the operation, research development, and producton processes requires the prior approval or ratification of the Atomic Energy Commission.

"7. That production schedules are prescribed by the Atomic Energy Commission.

"8. That all work and services of the Plaintiff under the terms of the Contract are subject in all respects to the approval of the Atomic Energy Commission.

"XV. That the area known as the Hanford works, which is the situs of Plaintiff's operation and performance of the Contract, was obtained by the Government for the sole purpose of constructing and operating the Government's atomic energy plant. Certain basic requirements make the area geographically desirable. The Government acquired by purchase or condemnation all of the land, something in excess of 400,000 acres, on which the communities and plants were built. Although the Government did not take exclusive jurisdiction of the area, all unauthorized persons are excluded from the area, with the exception of the village of Richland and the community of North Richland. All ingress and egress of people is controlled and only permitted to those with official business who have obtained security clearance in accordance with the requirements of Section 10 of the Atomic Energy Act. In addition to the controls on the ground that have been established by Public Proclamations 18 and 28, dated July 14, 1943, and November 12, 1946, respectively, issued by the Commanding Officer, Western Defense Command and by Headquarters, Sixth Army, respectively, the President of the United States of January 17, 1948, by Executive Order No. 9925 established air space reservation over the Hanford Works at Richland, Washington. Thus, complete control by the Government over the area is exercised. Practically all of the buildings on the land comprising the area known as Hanford Works, including the village of Richland, were either built for, have been purchased by, or belong to the Government.

"XVI. That Plaintiff performs all the municipal activities for the area included within the Hanford Works, particularly for the community of Richland. It constructs roads necessary for the prosecution of the work and maintains these roads. Further, the General Electric Company, at the direction of the Government, has provided school facilities, police and fire protection, sewage, lighting, town bus system, dormitories, and a hospital, all of which are

Government-owned. The Plaintiff manages and maintains housing facilities in the Hanford Works area and grants licenses and leases to persons, firms and corporations for the operation of businesses and commercial enterprises for the benefit of personnel located on or connected with the project. The General Electric Company collects revenue from such license and lease arrangements for and on behalf of the Government. Under its Contract, the General Electric Company provides these services and executes the necessary contracts for housing, licenses, leases and concessionaire agreements as agent of the Government. The Plaintiff has so acted at all times in its management of the Government properties and received reimbursements therefor, which are asserted by the Defendant to be taxable under the Washington State Business and Occupation Tax (Rule 223, Rules Relating to the Revenue Act). The General Electric Company owns none of the real or personal property which it operates and manages in the performance of its Contract.

". . .

"XX. That the Contract is to be performed entirely at the expense of the Government and the Contractor is not to be liable for and the Government shall indemnify and hold the contractor harmless against any delay, failure, loss, expense (including the expense of litigation) or damage (including personal injuries and deaths of persons and damage to property) of any kind and for any cause whatsoever arising out of or connected with the work and whether or not any employee or employees of the contractor is responsible therefor, unless such delay, failure, loss, expense has been established by the Government to have been caused directly by bad faith or wilful misconduct on the part of certain named corporate officers of the contractor within the scope of his or their authority and employment. This provision, which is an extraordinary provision in Government contracts, was approved by the President of the United States as it originally appeared in the contract between the du Pont Company and the Manhattan Engineer District. Further, it is provided that the Government shall assume and carry on the defense of all claims, suits or legal proceedings

which might be asserted against the contractor on account of acts or omissions in the performance of the work, and that the Government shall pay directly and discharge completely all final judgments entered against the contractor in such litigation or claims which are settled by agreement approved by the contracting officer.

"XXI. That salaries and expenses of the company's employees are paid by the Government. These salaries are subject to the approval of the contracting officer. When, in the opinion of the contracting officer, the Plaintiff's personnel or overhead is excessive for the proper performance of the contract, reductions are to be made as required by the contracting officer, subject to the right of appeal by the contractor pursuant to the "Disputes" article of the Contract.

"XXII. That the contractor is required to dismiss employees deemed by the Government to be incompetent, careless, insubordinate, or whose continued employment is deemed to be inimical to the public interest.

". . .

"XXIV. That under the Contract the General Electric Company provides the personnel and certain technical experience and the Government provides the facilities, money, and upon consultation with the contractor, formulates the policies and programs to be carried out, subject to the controls under the program by the Executive and Legislative Branches of the Government as set forth in the Atomic Energy Act. The actual plant operations are carried on by the employees of the Plaintiff under the general supervision of the Government, and subject to and in accordance with policies and instructions from the Government. At all times there is a very close coordination between the General Electric Company and the Government."

The business and occupation tax has been imposed and collected by the state of Washington under the applicable provisions of the revenue act of 1935. The Washington state tax commission periodically has measured the tax to be paid on the basis of the total annual sums paid by the United States Government to the Corporation. Such sums

cover costs of labor, material, supplies and services employed or used by the corporation in connection with its operations under the terms of the contract with the government. The state contends, among other things, that the tax or its incidence falls upon the corporation rather than upon the United States government; that the United States government, the atomic energy commission, or the activities thereof, are not taxes. In support of this contention, the state relies upon Rem. Rev. Stat. (Sup.), § 4370-14, which reads as follows:

"Purpose of title. It is not the purpose of this title that the taxes herein levied upon persons engaging in business shall be construed as taxes upon the purchasers or customers, but it is the intention that such taxes shall be levied upon, and collectible from, the person engaging in the business activities herein designated and that such taxes shall constitute a part of the operating overhead of such persons engaging in business."

Confronted with the opinion of the United States Supreme Court in *Carson v. Roane-Anderson Co., supra*, the technical distinction urged by the state, and the argument or legal conclusion based thereon, appear to me to be of no consequence, whatsoever, in the instant case. If the United States Congress has the power to immunize respondent corporation from state taxation; if the performance by respondent of its contract with the United States government constitutes "activities" of the atomic energy commission, as the term "activities" is used in § 9(b); or, if the decision of the United States supreme court in *Carson* v. *Roane-Anderson Co., supra*, establishes an immunity from state taxation under § 9(b) sufficiently broad to encompass respondent's activities in the state of Washington; then, most certainly, the above-mentioned contentions of the state are of no avail.

It may be of some interest to note that the opinion was rendered in the *Carson* case after the superior court for Thurston county rendered its decision in the instant case. Furthermore, after the opinion of the United States supreme court was rendered in the *Carson* case, knowledge of

its implications as to state tax revenues was received with much apprehension by various chief state executives and other state officials. This is evidenced by the government's printed report entitled, "Hearing before the Joint Committee on Atomic Energy Congress of the United States on State Taxation of Atomic Energy Commission Contractors," dated April 24, 1952. Contained in the report is a letter from Governor Arthur B. Langlie, of the state of Washington, addressed to members of the joint committee on atomic energy of the Congress. It reads, in part, as follows (p. 38):

"Dear Senator: I feel it my urgent duty as Governor of the State of Washington to bring to your attention the possible consequences of the decision handed down by the Supreme Court of the Supreme Court of the United States on January 7, 1952, in the cases of *Carson v. Roane-Anderson Co. and Carson v. Carbide & Carbon Corp.* and to request you, as a member of the Joint Congressional Committee on Atomic Energy, to lend your every effort in obtaining the necessary congressional action correcting or clarifying Section 9(b) of the Atomic Act of 1946.

". . . The matter for greatest concern is the fact that the Court accepted the Government's proposition that Congress, by the use of the word 'activities' in said Section 9(b), intended to grant a tax exemption to private independent contractors. *Under this decision there seems little escape from the conclusion that private independent contractors with the Atomic Energy Commission may now be completely immune from all State and local taxation.*

"While the Roane-Anderson case deals with sales and use taxes, *yet there is no limitation of the exemption indicated in the opinion.* If 'activities' refers to contractor's activities then by literal application of the statute, these contractors 'are hereby expressly exempted from taxation in any manner or form by any State, county, municipality, or any subdivision thereof.' Real and personal property taxes, income taxes, unemployment compensation and other payroll taxes, business and occupation taxes and other franchises, and all similar levies would thus be included within the scope of the exemption. Some apprehension has been

further voiced that the decision might be equally applicable to sub-contractors, sub-subcontractors, and even those who merely sell merchandise to those involved in the performance of contracts.

". . . If the Roane-Anderson Co. decision is held to be controlling the State will be required to refund approximately $11/4 million and should the doctrine of that case be extended to subcontractors the State's tax problem would be multiplied many times over. There is the even more serious possibility that the right of the State to collect various payroll taxes will be imperiled . . .

"In my view, the interpretation of the Court is a most serious interference with State and local tax powers. If this principle is extended to apply to other types of Federal contractors, it means that a substantial part of the State and local tax base has been swept out of existence. Fundamentally, the principle of concurrent powers of taxation in the Federal and State governments is implicitly denied by the Court's interpretation. . . ." (Emphasis supplied.)

Much in the same vein is a letter from Governor Adlai E. Stevenson, of the state of Illinois, which appears in the same report at p. 1, and in part, reads as follows:

"On January 7 last, the United States Supreme Court held, in the cases of *Carson v. Roane-Anderson Company and Carson v. Carbide and Carbon Corporation*, that the word 'activities' in Section 9(b) of the Atomic Energy Act of 1946 covered private persons and corporations doing work for the Atomic Energy Commission on an independent contractual basis in such manner that the sales and use taxes of the State of Tennessee could not be applied in those cases. The issue of constitutional power was not involved in the cases and the Court merely held that the Congress, in the section quoted, intended to extend tax immunity to these contractors.

"Because of the magnitude of the operations of the atomic energy commission, and also because of the thrust of the Supreme Court's holding would not appear to be necessarily confined merely to sales and use taxes, the States generally

have been quite alarmed by this decision. Their researches suggest that perhaps Congress really did not intend to create any such immunity, and this squares with previous efforts on the part of Congress to resist efforts to extend the tax immunity of the Federal Government to its contractors. You will recall that, throughout the last war, it was the Federal policy not to allow contractors with the Federal Government to share its immunity from State taxes.

"Those States which happened to have representatives on the Joint Committee on Atomic Energy have been asked to assist in seeking clarification of congressional policy on this matter and, if it meets with the true congressional intent, to suggest an amendment of the law which will accurately reflect that intent. One way to do this, of course, would be to strike from Section 9(b) the word 'activities' which, it can be readily seen, is a word of confusing breadth and which may not be a happy choice to convey the true desires of Congress in this regard. I am sure that all of the States, including Illinois, will greatly appreciate your active consideration of this problem."

In the *Carson* case, commenting on the Tennessee tax statutes there involved, the United States supreme court said: (p. 233)

"The Retailers' Sales Tax Act of Tennessee, Ten. Acts 1947, c 3, imposes a sales tax on the sale of goods in Tennessee and a use tax on the use within the state of goods purchased elsewhere. Tennessee collected these taxes from respondents who paid them under protest and then brought these suits to recover them and to enjoin future collections. Two of the respondents are private companies who are contractors for the Atomic Energy Commission and who paid use taxes; two are merchants who paid sales taxes on sales to those contractors and who passed the taxes on to them. The use taxes and the sales taxes were on articles used by the contractors in the performance of their contracts with the Commission."

At this point we note that the Tennessee supreme court held (Roane-Anderson v. Carson, 192 Tenn. 150, 239 S. W. (2d) 27), that the particular taxes of that state were not pro-

hibited by the United States Constitution, *but were forbidden by Sec. 9(b) of the atomic energy act.*

As to the power of congress to provide an immunity from state taxation, in *Carson v. Roane-Anderson Co., supra,* the United States supreme court said (p. 233):

". . . The constitutional power of Congress to protect any of its agencies from state taxation . . . has long been recognized as applying to those with whom it has made authorized contracts. See *Thomson v. Pacific R. Co.* 9 Wall. 579, 588-589; *James v. Dravo Contracting Co.,* 302 U. S. 134, 160-161."

The United States supreme court further said (p. 234):

". . . *Certainly the policy behind the power of Congress to create tax immunities does not turn on the nature of the agency doing the work of the Government. The power stems from the power to preserve and protect functions validly authorized (Pittman v. Home Owners' Corp., supra,* p. 33)—*the power to make all laws necessary and proper for carrying into execution the powers vested in the Congress.* U. S. Const., Art. 1, Sec. 8, cl. 18. Hence if the present contracts which the respondent contractors have with the United States, and the performance thereunder, are 'activities' with the meaning of Sec. 9(b) of the Act, the immunity is clear. Our view is that they are and that the judgments below must be affirmed." (Emphasis supplied.)

Referring to the legislative history of the atomic energy act, the United States supreme court continued (p. 234):

". . . The question whether the Commission should be empowered to employ private contractors in performance of its functions or whether the Commission should itself be the entrepreneur was an issue of national policy much discussed and debated at the time the legislation was before the Congress."

It is pointed out in the opinion that Congress determined it would be our national policy to permit the atomic energy commission to contract with and to use private contractors

and their know-how to assist the commission in the conduct of its affairs. The court, referring to the commission, said (p. 235):

". . . Its activities may, in other words, be performed by it directly or through the agencies of private enterprise."

As to the interpretation and application of the term "activities," used in Sec. 9(b), the court said (p. 235):

"Congress uses the word 'activities' in various sections of the Act, and seems each time to give it a broad sweep. The Congressional or Joint Committee constituted under Sec. 15 is directed to study 'the activities' of the Commission. The reports which the Commission is directed to submit to Congress pursuant to Sec. 17 concern its 'activities.' Section 9(b) authorizes the Commission to make payments to state and local governments in lieu of property taxes in those areas 'in which the activities of the Commission are carried on and in which the Commission has acquired property' previously subject to local taxation. *In none of these sections do we find any suggestion that 'activities' is used in a narrow sense to describe less than all of the functions of the Commission. The meaning of 'activities' as applied either to an individual or to a government agency may be broad enough to include what is done through independent contractors as well as through agents.* Certainly where the pattern of conduct visualized by the Act is the use of independent contractors or agents from the field of private enterprise, *the inference is strong that 'activities' means all authorized methods of performing the governmental function. We find no contrary evidence from the legislative history.*" (Emphasis supplied.)

I am convinced that in the *Carson* case the United States supreme court has laid down a policy of immunity from state taxation with a broad brush. Ours is a government of dual sovereignty—state and federal. In the very nature of things, we are bound by and must follow the decisions of the United States supreme court under the supremacy clause of the United States Constitution. The *Carson* case is con-

trolling. It constitutes a compelling precedent and decides the basic questions raised in the instant case in a manner contrary to the contentions of the state of Washington. In this connection, it is suggested that the authoritative interpretation of the Federal statute (Sec. 9(b) of the atomic energy act) by the United States supreme court calls into effect subsection (f) of Rem. Rev. Stat. (Sup.), Sec. 8370-12 (our business and occupation tax statute), which reads:

"In computing tax there may be deducted from the measure of tax the following items:

". . .

"(f) Amounts derived from business which the State of Washington is prohibited from taxing under the constitution of this state or the constitution or laws of the United States."

There is one further point in this case. The tax immunity is established by Sec. 9(b) as of the effective date of the atomic energy act. Business transacted in this state by respondent corporation under its contract with the Federal government *prior* to the effective date of the act, would be subject to the business and occupation tax of the state of Washington, under the decision in *Silas Mason Co. v. Tax Commission, supra.* With the exception of whatever difference this may make in the amount of the tax to be refunded, I think the judgment of the trial court should be affirmed.

SCHWELLENBACH, J.: I concur.

DONWORTH, J. (dissenting)—I am in accord with the views expressed in Judge Finley's dissenting opinion but I wish to emphasize his reference to the supremacy clause of the United States constitution because, in my opinion, we are bound by the interpretation which the United States Supreme Court placed upon the word "activities" in Sec. 9(b) of the atomic energy act of 1946, in *Carson v. Roane-Anderson Co.*, 342 U.S. 232, 96 L. Ed. 257. To my mind this constitutional provision is the key to the solution of the problem presented in this case.

The contract between respondent and the atomic energy commission (described in the findings of the trial court) makes it very evident that respondent is merely spending money belonging to the United States in the manner directed by the commission. Respondent's actions pursuant to the contract are not its own but are in fact, as well as in law, activities of the commission. The relationship created by the contract differs materially from that which existed between the government and the contractor in *Silas Mason Co. v. Tax Commission*, 302 U.S. 186, 82 L. Ed. 187, 58 S. Ct. 233, where the latter undertook to construct a certain dam and power house for a lump sum. In so doing the contractor expended its own funds and presumably realized a profit. Here respondent's actions are directly controlled by the commission in the minutest detail and the only monetary compensation received by respondent for acting as the commission's agent is the sum of one dollar.

Article VI of the United States constitution contains the supremacy clause which reads:

"This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; *and the judges in every State shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.*" (Italics mine.)

This provision means that, as a judge of this court, I am bound by the interpretation which the Supreme Court of the United States has placed upon the act of congress involved in the case at bar. This statute in Sec. 9(b) provides that ". . . the activities . . . of the commission are hereby expressly exempted from taxation in any manner or form by any state . . ."

The Supreme Court which is the final authority on the meaning of acts of congress has given the term "activities" a broad interpretation and this is binding upon all state courts. Federal statutes must be uniformly construed

throughout the United States both in Federal and state courts.

Therefore, under the supremacy clause the decision in the *Carson* case, *supra*, holding that the term "activities" in the atomic energy act means "all authorized methods of performing the governmental functions" compels an affirmance of the trial court's judgment.

The only remedy available to appellant is to seek redress from the congress.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
1. The nature of the contract, the functions of General Electric, and the relationship between General Electric and the Atomic Energy Commission	2
2. The proceedings below	6
Specification of errors to be urged	9
Summary of Argument	10
Argument	12
The exemption provided by Section 9(b) of the Atomic Energy Act of 1946 of "the property, activities, and income of the Commission . . . from taxation in any manner or form by any state" comprehends the taxation of a cost-type operating contractor of the Atomic Energy Commission under a state business and occupation tax	12
Conclusion	19
Appendix	20

CITATIONS

Cases:

Carbide & Carbon Chemicals Corp. v. *Carson*, 192 Tenn. 150	10, 11, 12, 16
Carson v. *Roane-Anderson Co.*, 342 U.S. 232,	9, 10, 11, 12, 13, 14, 15, 16, 17, 18
Dameron v. *Brodhead*, 345 U.S. 322	18
Esso Standard Oil Co. v. *Evans*, 345 U.S. 495	16

Statutes:

Act of August 13, 1953, c. 432, 67 Stat. 575, amending the Atomic Energy Act of 1946	13
Atomic Energy Act of 1946, c. 724, 60 Stat. 755	2
Sec. 1(b)	20
Sec. 4(b)	21
Sec. 4(c)	21
Sec. 9(a)	22
Sec. 9(f)	9, 10, 11, 15, 18, 23
Sec. 12(a)	24
Sec. 15(a)	24
Sec. 15(b)	25
Sec. 17	25

Statutes—Continued

	Page
First War Powers Act of 1941, c. 593, 55 Stat. 838	2
Tennessee Retailers' Sales Tax Act, c. 3, Public Acts of 1947	17
Washington Business and Occupation Tax Statute, 6 Revised Code of Washington, 1951 (Revenue Act of 1935, Title II, as amended)	2, 9, 10
Sec. 82.04.050	26
Sec. 82.04.070	27
Sec. 82.04.110	27
Sec. 82.04.120	27
Sec. 82.04.130	27
Sec. 82.04.140	27
Sec. 82.04.150	27
Sec. 82.04.190	28
Sec. 82.04.220	6, 17, 28
Sec. 82.04.240	29
Sec. 82.04.250	29
Sec. 82.04.430	29
Sec. 82.04.450	30
Sec. 82.04.500	30

Miscellaneous:

Executive Order No. 9925, January 17, 1948	5
67 Harv. L. Rev. 359 (1953)	18

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 335

GENERAL ELECTRIC COMPANY AND UNITED STATES OF AMERICA, APPELLANTS

v.

THE STATE OF WASHINGTON

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR THE APPELLANTS

OPINIONS BELOW

The opinions of the Supreme Court of the State of Washington (R. 25-46) are reported at 256 P. 2d 265. The memorandum opinion and findings of fact and conclusions of law of the Superior Court of Thurston County (R. 9-21) are not reported.

JURISDICTION

The opinion of the Supreme Court of Washington was filed on April 14, 1953 (R. 25). A petition for rehearing (R. 47) was seasonably filed on May

6, 1953, by the appellants (R. 47-49) and was denied by an order entered on May 18, 1953 (R. 49). A Statement as to Jurisdiction was filed on September 11, 1953, and probable jurisdiction noted on November 9, 1953 (R. 270).

QUESTION PRESENTED

Whether the operations of an independent cost-type contractor of the Atomic Energy Commission in the performance of its contract are exempted by Section 9(b) of the Atomic Energy Act of 1946 from Washington's business and occupation tax.

STATUTES INVOLVED

The pertinent provisions of the Atomic Energy Act of 1946, c. 724, 60 Stat. 755, and the Washington business and occupation tax statute, Title II, c. 180, Laws of Washington, 1935, as amended, 6 Revised Code of Washington (1951), Secs. 82.04.010, *et seq.*, are set forth in the Appendix, *infra*, pp. 20-30.

STATEMENT

1. *The nature of the contract, the functions of General Electric, and the relationship between General Electric and the Atomic Energy Commission:* On May 15, 1946, acting pursuant to delegations of authority under the First War Powers Act of 1941, c. 593, 55 Stat. 838, the Manhattan Engineer District, Corps of Engineers, War Department, entered into a "pure cost" contract, No. W-31-109-Eng.-52, with the appellant, General Electric Company (R. 10). This contract was subsequently formally adopted by the United States Atomic Energy Commission on January 28, 1947 (R. 11).

In general, the contract contemplates that the General Electric Company is to provide the personnel and certain technical experience and that the Government is to provide the facilities and funds to operate successfully the Hanford Engineer Works, a federally owned atomic energy installation located at Richland, Washington. Under the contract, General Electric is obligated: (1) to manage and operate all the facilities for production of fissionable material at the Hanford Engineer Works; (2) to manage and operate the village of Richland, Washington, and the construction camp community at North Richland, providing necessary municipal facilities and services at Government expense and serving as agent for the Government for all real estate in the community; (3) to construct or provide for the construction of plants and facilities needed for the manufacturing processes and related facilities, residential housing, and other facilities necessary for the functioning of the community; (4) to provide architect-engineer services in connection with the foregoing; and (5) to conduct development and research relative to production of fissionable materials. (R. 13-14.)

Management and operation of all facilities for production of fissionable material are carried on by employees of the General Electric Company under the general supervision and direction of the Atomic Energy Commission (R. 19). General Electric performs general municipal activities for the community of Richland. It constructs and maintains necessary roads. It provides, at Government direc-

tion, school services, police and fire protection, sewerage, lighting, a town bus system, dormitories, and a hospital, all of the facilities for which are Government owned. It manages and maintains housing facilities, and grants licenses and leases for the operation of businesses and commercial enterprises for the benefit of personnel connected with the project. (R. 16.) Among the architectural and engineering services required by the contract are the preparation of preliminary studies, final designs, cost estimates and field tests (R. 14).

General Electric's performance of the contract is at all times under the supervision and direction of the Hanford Operations Office of the Atomic Energy Commission. Prior approval or ratification of the Atomic Energy Commission must be obtained for all purchases or contracts over $5,000, all construction contracts over $2,000, and all purchases or use of materials, supplies or equipment of General Electric's own manufacture when the price exceeds $250. The Commission has the right to pay directly to third parties all sums due for labor, material and other charges arising from the contract. (R. 15.) The salaries of employees are subject to the approval of the Commission's contracting officer, as are the extent and character of training given to personnel (R. 18, 19). In construction, operations, and research, General Electric must follow the administrative and technical procedures prescribed by the Atomic Energy Commission, and must meet production schedules prescribed by the Commission (R. 15).

Although the United States has not assumed exclusive civil and criminal jurisdiction over the Hanford Engineer Works area, complete control is exercised over it. Ingress and egress of persons to and from the area, with the exception of the village of Richland and the community of North Richland, are permitted only to those on official business who have obtained security clearance in accordance with the requirements of Section 10 of the Atomic Energy Act of 1946. On January 17, 1948, the President of the United States, by Executive Order No. 9925, established an air space reservation over the Hanford Works at Richland, Washington. (R. 16.)

By virtue of the terms of the Atomic Energy Act of 1946 and the contract, there is vested in the Atomic Energy Commission title to all property, equipment, designs, drawings and specifications procured or created under the contract (R. 14). The fissionable materials used in the operation of the plant are procured and furnished by the Government. Their use while in the process and after manufacture is carefully and systematically controlled and accounted for under the direction of the Government, as is the use of the product and all its component parts. (R. 19.) Patents to all processes and designs conceived or developed under the contract are owned by the Government or are assignable to it if the Commission desires (R. 14). All property, materials, supplies or equipment procured by General Electric for use under the contract must be marked in a manner clearly indicat-

ing that the items are the property of the Government (R. 17). The General Electric Company owns none of the real or personal property which it operates or manages in the performance of the contract (R. 17).

General Electric has never been required to utilize its own funds. The Commission is obligated to reimburse it for all costs of whatever nature incurred under the contract. Salaries of employees, the cost of materials procured for the work, and any and all expenses incurred are paid out of a fund created principally by (1) advances and current reimbursements from the United States and (2) funds collected by General Electric on behalf of the United States from third parties in connection with the contract. (R. 11.) This fund is maintained in a special bank account separate from General Electric's own funds. General Electric is to receive as sole payment for its services at the completion of the contract a fixed fee of one dollar (R. 14).

2. *The proceedings below:* The Washington business and occupation tax statute imposes a tax upon "every person * * * for the act or privilege of engaging in business activities". 6 Revised Code of Washington (1951), Section 82.04.220 (Appendix, *infra*, pp. 28-29). From the date of General Electric's entry upon the performance of the contract with the Government and continuously since, the Tax Commission of the State of Washington has asserted that in the performance of its contract General Electric is engaged in business as a person

making sales at retail, one of the seven general classifications into which the act divides all business activities (R. 12). The tax asserted by the state has been measured by the total of the amounts paid as reimbursements by the United States into the special account referred to above and the amounts received by General Electric from third parties in connection with the contract and deposited in the account (R. 12-13). General Electric did not challenge the suitability of the retailer classification (under which the tax was measured),[1] the measure used to compute the tax, or the correctness of the tax computation. It maintained that the Washington business and occupation tax statute, as applied to General Electric's performance of its contract with the Atomic Energy Commission, was invalid under the Constitution of the United States and under Section 9(b) of the Atomic Energy Act of 1946 (R. 4). Solely in order to avoid penalties, General Electric paid in full the taxes demanded by the Tax Commission up to the date of the commencement of this action, amounting to $462,329.46 (R. 3).

In conformity with the statutes of the State of Washington, General Electric in due time filed its petition for refund of the taxes paid by it. The Tax Commission held hearings upon the petition

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[1] The opinion of the Supreme Court of Washington inadvertently quotes those provisions of the business and occupation tax pertaining to manufacturers. No claim was ever advanced by the Washington Tax Commission that General Electric fell within the manufacturer classification of the statute.

and on April 1, 1949, entered an order denying the refund (R. 20). General Electric filed a Notice of Appeal in the Superior Court of Thurston County (R. 1) and the United States of America intervened (R. 8). Trial was held at which testimony of witnesses was received and exhibits introduced. The Superior Court entered judgment for General Electric Company and rendered findings of fact and conclusions of law. By stipulation of counsel, it was agreed that General Electric had paid additional business and occupational tax for the period January 1, 1949, through June 30, 1951, of $485,750.19, which amount the court found should be included within the allowed recovery, a total of $938,437.25 (R. 21). In a memorandum opinion (R. 9) the court held that Section 9(b) of the Atomic Energy Act of 1946 exempted General Electric from the tax with respect to its performance under the contract on and after January 1, 1947, the date on which the Atomic Energy Commission acquired control over the project.[2]

The State of Washington appealed (R. 23) to the Supreme Court of the State of Washington where the judgment of the Superior Court was reversed. The Supreme Court, three Justices dissenting, held

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[2] General Electric began paying the tax September 1, 1946. Operation of the Hanford Engineer Works did not fall under the authority of the Atomic Energy Commission until January 1, 1947, when, pursuant to Executive Order No. 9816, 12 Fed. Reg. 37, the atomic energy enterprise was transferred to it from the Manhattan Engineer District. The Superior Court of Thurston County found that General Electric was not entitled to a refund of the amount paid prior to this date. No appeal was taken from this ruling.

that, under the circumstances of this case, Section 9(b) of the Atomic Energy Act of 1946 was not before the court for construction or application, that it was not bound by the decision in *Carson* v. *Roane-Anderson Co.*, 342 U.S. 232, and that the Washington business and occupation tax statute was valid as applied here (R. 25-30). Appellants' petition for rehearing was denied by order entered May 18, 1953 (R. 49).

SPECIFICATION OF ERRORS TO BE URGED*

The Supreme Court of the State of Washington erred:

1. In holding that Section 9(b) of the Atomic Energy Act of 1946, c. 724, 60 Stat. 755 (42 U.S.C. 1946 ed., Sec. 1809(b)), was not before the court for construction or application.

2. In holding that the General Electric Company's contract with the Atomic Energy Commission, and its performance thereunder, did not render General Electric Company's operation of the Hanford Engineer Works an activity of the Atomic Energy Commission.

3. In holding that Section 9(b) of the Atomic Energy Act of 1946, did not prevent the State of Washington from imposing its business and occupation tax upon the General Electric Company in its performance of its contract with the Atomic Energy Commission, under the provisions of Title II, c. 180, Reve-

* These are the errors assigned which appear in the record at pp. 53-54.

nue Act of 1935, as amended, 6 Revised Code of Washington (1951), Sections 82.04.010 *et seq.*

4. In holding that the business and occupation tax imposed by the State of Washington upon the General Electric Company under the provisions of Title II, c. 180, Revenue Act of 1935, as amended, was valid as applied.

5. In failing to hold that Title II, c. 180, Revenue Act of 1935, as amended, as here applied by the Tax Commission of the State of Washington to the General Electric Company is invalid as repugnant to, and violative of, the Constitution of the United States.

6. In failing to hold that Title II, c. 180, Revenue Act of 1935, as amended, as here applied by the Tax Commission of the State of Washington to the General Electric Company is invalid as repugnant to, and violative of the Constitution of the United States.

7. In failing to hold that Section 9(b) of the Atomic Energy Act of 1946 exempts the General Electric Company from the Washington business and occupation tax in the performance of its contract with the Atomic Energy Commission.

8. In reversing the judgment of the Superior Court of Thurston County, Washington.

SUMMARY OF ARGUMENT

Like *Carson v. Roane-Anderson Co.*, 342 U.S. 232, affirming 192 Tenn. 150, this case is governed by Section 9(b) of the Atomic Energy Act which provides among other things that "the property,

activities, and income of the Commission are . . . exempted from taxation in any manner or form by any State . . ." The record does not present the question whether an exemption may be sustained here, independently of Section 9(b), on the ground of implied constitutional immunity. In order to remove this constitutional issue from the litigation, it was conceded below for the purposes of this case that, but for Section 9(b), the tax could be validly imposed. Hence, the only question for decision is statutory: whether Washington's tax on "the act or privilege of engaging in business activities", applied to a cost-type independent contractor of the Atomic Energy Commission who operates the Commission's facilities for producing fissionable materials and manages the nearby Government-owned towns, constitutes "taxation in any manner or form" on "activities of the Commission."

The activities of General Electric which have been taxed here are precisely the same as the activities of the contractors in *Carson*; the relationship between contractor and Commission is the same; and so is every other element in the two situations bearing on exemption from taxation. Only the type of tax differs, but since a business and occupation tax is no less a form of taxation of "activities" than sales and use taxes, this difference cannot in our view sustain a different conclusion from that reached by this Court as well as the Supreme Court of Tennessee. Since the exemption applies to "taxation in any manner or form", the type of tax imposed is entirely irrelevant.

ARGUMENT

The Exemption Provided by Section 9(b) of the Atomic Energy Act of 1946 of "the Property, Activities, and Income of the Commission . . . From Taxation in Any Manner or Form by Any State" Comprehends the Taxation of a Cost-Type Operating Contractor of the Atomic Energy Commission under a State Business and Occupation Tax.

In *Carson* v. *Roane-Anderson Co.*, 342 U.S. 232, affirming 192 Tenn. 150, this Court held that Section 9(b) of the Atomic Energy Act (*infra*, p. 24) barred the State of Tennessee from imposing use and sales taxes on articles used by contractors of the Commission in the performance of their contracts at Oak Ridge. The use taxes had been levied on the Roane-Anderson Company, which managed the Government-owned town of Oak Ridge, and on Carbide & Carbon Chemicals Corporation, which operated the Commission's Oak Ridge plants for the production of fissionable materials. The sales taxes had been levied on Tennessee merchants and had been passed on by them to their purchasers, Roane-Anderson and Carbide. This Court, after reviewing the relevant provisions and legislative history of the Act, observed that there was no "suggestion that 'activities' is used [in Section 9(b)] in a narrow sense to describe less than all of the functions of the Commission," and that "as applied either to an individual or to a government agency," the term "may be broad enough to include what is done through independent contractors as well as through agents." 342 U.S. at 236. As its conclusion, the opinion stated (342 U.S. at 236):

> Certainly where the pattern of conduct visualized by the Act is the use of independent contractors or agents from the field of private enterprise, the inference is strong that 'activities' means all authorized methods of performing the governmental function. We find no contrary evidence from the legislative history.

In short, *Carson* treats a tax on the activities of a contractor on behalf of the Commission as a tax on the activities of the Commission.

What possible grounds are there for reaching a different result in the case at bar?[4] No elaboration is needed of the proposition that the contract, the nature and locus of work performed, and the relationship between contractor and Commission are substantially the same here as they were in *Carson* v. *Roane-Anderson Co.* General Electric has a single contract which comprehends everything comprehended in the two separate contracts involved in *Carson*. It is responsible, as was Roane-Anderson, for the management of a Government-owned town, and as was Carbide, for the operation of Government-owned plants for the production of fissionable materials. These activities are carried out in Hanford Engineer Works Area, in which are included the village of Richland and the community of North Richland. As in Oak Ridge, the United States exercises complete con-

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[4] Public Law No. 262 of August 13, 1953, 67 Stat. 575, repealed the exemption conferred by the last sentence of Section 9(b), but only for tax liabilities accruing after October 1, 1953. The repealer has no effect on taxes accruing prior to that date.

trol over production areas, regulating egress and ingress of persons, establishing and administering security measures, and prescribing and enforcing regulations for health and safety. As in Oak Ridge, there have not been any special restrictions in recent years on access to residential areas, and in neither the production nor residential areas has the Federal Government assumed exclusive civil and criminal jurisdiction. Like Carbide, General Electric manages the Government-owned production facilities, under general supervision and direction of the Atomic Energy Commission, and like Roane-Anderson, it provides and maintains, at Government direction, school services, police and fire protection, sewerage, lighting, public transportation, dormitories, and a hospital, all the facilities for which are Government-owned.

As at Oak Ridge, all property, products, plants, materials, supplies, equipment, designs, drawings and specifications procured or created under the contract belong to the Government. General Electric, like Carbide and Roane-Anderson, is not required to use its own funds. The Commission is obligated to reimburse it for all costs incurred under the contract, and has arranged to do so by setting up a special bank account on which General Electric is authorized to draw, an account made up of advances and reimbursements from the United States and funds received by General Electric from third parties in connection with the contract.

Thus, the activities which the Supreme Court of Washington has held taxable by the State in this

case are indistinguishable from those held by the Supreme Court of Tennessee to be exempt from State taxation in the *Carson* case, a judgment affirmed by this Court only two years ago. The sole difference is in the type of tax imposed in the two situations. Tennessee sought to impose sales and use taxes. Washington seeks to impose a business and occupation tax. The significance, if any, of this difference is the crux of this case. A single—and, we respectfully submit, easily answered—question is presented: Is the provision of Section 9(b) that "the property, activities, and income of the Commission, are hereby expressly exempted from taxation in any manner or form by any State" applicable to a State business and occupation tax as it is to State sales and use taxes?

Since this Court's decision in *Carson*, there is no room for argument denying that General Electric's activities here are "activities of the Commission" as that term is used in Section 9(b). The Washington business and occupation tax is by its terms "a tax for the act or privilege of engaging in business activities". See *infra*, pp. 28-29. The particular business activities involved here, the activities of General Electric under its contract with the Commission, are precisely the kind of activities carried out by Roane-Anderson and Carbide at Oak Ridge and held by the Court to be "activities of the Commission" in the statutory sense.[8]

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[8] Appended to the Government's brief in *Carson* (Oct. Term 1951, Nos. 186, 187) was a letter from the then General Counsel of the Atomic Energy Commission listing the "amount of sales and use taxes and business and occupation taxes now in dispute

These activities are no less "activities of the Commission" if General Electric performs them as an independent contractor rather than as an agent of the Commission. Indeed, in order to keep this litigation uncomplicated by additional issues of implied constitutional immunity which would be present if General Electric were to be regarded as an agent of the Commission, we have conceded for purposes of the case at bar that General Electric is an independent contractor, although as Finley, J., dissenting below, points out, a contrary argument could be made on the record. See R. 32-33, 256 P. 2d 265, 269-270.[6] In concluding that this makes a difference under Section 9(b), the court below has disregarded the facts, record, and decision in the *Carson* case, not to mention the relevant excerpts from the opinion of this Court which we have set forth above. The *Carson* case involved independent contractors, as the Supreme Court of Tennessee expressly held (*Carbide & Carbon Chemicals Corp.* v. *Carson*, 192 Tenn. 150); the Government did not contend otherwise in this Court; and

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in the various states where the Commission has installations". The Washington business and occupation tax was included in the list. The Attorney General of Washington filed a brief *amicus curiae* in *Carson* (see 342 U.S. at 233), referring to the present litigation and declaring that the questions in this and the *Carson* case were "substantially the same" although "not identical" because of the difference in taxes (Brief for the State of Washington, Oct. Term 1951, Nos. 186, 187, at pp. 4-5).

[6] The court below relies on the decision of the Supreme Court of Arkansas in *Parker* v. *Kern-Limerick, Inc.* (R. 28), now pending on appeal, No. 115, this Term, but that case involves only the constitutional immunity of the United States and not a Congressional immunising provision like Section 9(b). The same is true of *Esso Standard Oil Co.* v. *Evans*, 345 U.S. 495, decided last Term.

the Court decided the case on that assumption. See *supra*, pp. 12-13, and 342 U.S. at 235.

If, then, the subject matter of taxation here is "activities of the Commission", can there be any basis for concluding that the tax as applied in this case is nevertheless not within the exemption defined by Congress? The opinion below suggests without spelling out what appears to be the only formal logical path to such a conclusion (see R. 28). The Washington statute purports to tax "*the act or privilege of engaging in*" the activities in question, not the activities themselves. Since the usual if not universal practice in drafting statutes providing for the taxation of any given range of business activities is to frame the tax in terms of the act or privilege of engaging in the activities, we respectfully suggest that such a refined distinction may be dismissed as a sterile word-game, peculiarly inappropriate in applying a statute like Section 9(b) which, as *Carson* teaches, is not to be given a niggardly or technical reading. Indeed, the Tennessee taxes involved in *Carson* were also called privilege taxes by the Tennessee legislature and were levied on the privileges of sale and use.[7] Moreover, even if the distinction were accepted as

[7] The Tennessee statute provided (Sec. 3 of the Tennessee Retailers' Sales Tax Act, c. 3, Public Acts of 1947): "It is hereby declared to be the legislative intent that every person is *exercising a taxable privilege who engages in the business of selling* tangible personal property at retail in this State, or who rents or furnishes any of the things or services taxable under this Act, or who stores for use or consumption in this State any item or article of tangible personal property as defined herein and who leases or rents such property within the State of Tennessee. *For the exercise of said privilege, a tax is levied as follows* * * *" (emphasis added).

having more than purely verbal significance, the language of Section 9(b) exempts activities of the Commission from State taxation *"in any manner or form."* Granting *arguendo* that a real difference could be perceived between a tax on activities and a tax on the act or privilege of engaging in them, it would be impossible, without reducing the phrase "in any manner or form" to surplusage, to conclude that Section 9(b) does not comprehend both.

Another contention of the appellee, reflected in the opinion below (R. 29)—that the straightforward reading of Section 9(b) we argue for would raise "a very serious constitutional question involving the power of the United States to restrict the right of this state to impose such a tax upon those who exercised the privilege of doing business within its borders"—is too definitively answered by the opinion of this Court in *Carson* (342 U.S. at 233-4) to require further discussion. See also *Dameron* v. *Brodhead*, 345 U.S. 322, 324-325; and cf. 67 Harv. L. Rev. 359 (1953).

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of the State of Washington should be reversed.

Respectfully submitted,

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JANUARY, 1954.

APPENDIX

ATOMIC ENERGY ACT OF 1946, c. 724, 60 Stat. 755

SECTION 1. * * *

(b) PURPOSE OF ACT.—It is the purpose of this Act to effectuate the policies set out in section 1(a) by providing, among others, for the following major programs relating to atomic energy:

(1) A program of assisting and fostering private research and development to encourage maximum scientific progress;

(2) A program for the control of scientific and technical information which will permit the dissemination of such information to encourage scientific progress, and for the sharing on a reciprocal basis of information concerning the practical industrial application of atomic energy as soon as effective and enforceable safeguards against its use for destructive purposes can be devised;

(3) A program of federally conducted research and development to assure the Government of adequate scientific and technical accomplishment;

(4) A program for Government control of the production, ownership, and use of fissionable material to assure the common defense and security and to insure the broadest possible exploitation of the fields; and

(5) A program of administration which will be consistent with the foregoing policies and with international arrangements made by the United States, and which will enable the Congress to be currently informed so as to take further legislative action as may hereafter be appropriate. [42 U. S. C. 1946 ed., Sec. 1801.]

SEC. 4. * * *

(b) PROHIBITION.—It shall be unlawful for any person to own any facilities for the production of fissionable material or for any person to produce fissionable material, except to the extent authorized by subsection (c).

(c) OWNERSHIP AND OPERATION OF PRODUCTION FACILITIES.—

(1) OWNERSHIP OF PRODUCTION FACILITIES.—The Commission, as agent of and on behalf of the United States, shall be the exclusive owner of all facilities for the production of fissionable material other than facilities which (A) are useful in the conduct of research and development activities in the fields specified in section 3, and (B) do not, in the opinion of the Commission, have a potential production rate adequate to enable the operator of such facilities to produce within a reasonable period of time a sufficient quantity of fissionable material to produce an atomic bomb or any other atomic weapon.

(2) OPERATION OF THE COMMISSION'S PRODUCTION FACILITIES.—The Commission is authorized and directed to produce or to provide for the production of fissionable material in its own facilities. To the extent deemed necessary, the Commission is authorized to make, or to continue in effect, contracts with persons obligating them to produce fissionable material in facilities owned by the Commission. The Commission is also authorized to enter into research and development contracts authorizing the contractor to produce fissionable material in facilities owned by the Commission to the extent that the production of such fissionable material may be incident

to the conduct of research and development activities under such contracts. Any contract entered into under this section shall contain provisions (A) prohibiting the contractor with the Commission from subcontracting any part of the work he is obligated to perform under the contract, except as authorized by the Commission, and (B) obligating the contractor to make such reports to the Commission as it may deem appropriate with respect to his activities under the contract, to submit to frequent inspection by employees of the Commission of all such activities, and to comply with all safety and security regulations which may be prescribed by the Commission. Any contract made under the provisions of this paragraph may be made without regard to the provisions of section 3709 of the Revised Statutes (U. S. C., title 41, sec. 5) upon certification by the Commission that such action is necessary in the interest of the common defense and security, or upon a showing that advertising is not reasonably practicable, and partial and advance payments may be made under such contracts. The President shall determine at least once each year the quantities of fissionable material to be produced under this paragraph.

(3) OPERATION OF OTHER PRODUCTION FACILITIES. —Fissionable material may be produced in the conduct of research and development activities in facilities which, under paragraph (1) above, are not required to be owned by the Commission.

[42 U.S.C. 1946 ed., Sec. 1804.]

SEC. 9. (a) The President shall direct the transfer to the Commission of all interests owned by the

United States or any Government agency in the following property:

(1) All fissionable material; all atomic weapons and parts thereof; all facilities, equipment, and materials for the processing, production or utilization of fissionable material or atomic energy; all processes and technical information of any kind, and the source thereof (including data, drawings, specifications, patents, patent applications, and other sources) relating to the processing, production, or utilization of fissionable material or atomic energy; and all contracts, agreements, leases, patents, applications for patents, inventions and discoveries (whether patented or unpatented), and other rights of any kind concerning any such items;

(2) All facilities, equipment, and materials, devoted primarily to atomic energy research and development; and

(3) Such other property owned by or in the custody or control of the Manhattan Engineer District or other Government agencies as the President may determine.

(b) In order to render financial assistance to those States and localities in which the activities of the Commission are carried on and in which the Commission has acquired property previously subject to State and local taxation, the Commission is authorized to make payments to State and local governments in lieu of property taxes. Such payments may be in the amounts, at the times, and upon the terms the Commission deems appropriate, but the Commission shall be guided by the policy of not making payments in excess of the taxes which would have been payable for such property in the condi-

tion in which it was acquired, except in cases where special burdens have been cast upon the State or local government by activities of the Commission, the Manhattan Engineer District or their agents. In any such case, any benefit accruing to the State or local government by reason of such activities shall be considered in determining the amount of the payment. The Commission, and the property, activities, and income of the Commission, are hereby expressly exempted from taxation in any manner or form by any State, county, municipality, or any subdivision thereof.

[42 U.S.C. 1946 ed., Sec. 1809.]

SEC. 12. (a) In the performance of its functions the Commission is authorized to—

* * * * *

(5) Acquire such materials, property, equipment, and facilities, establish or construct such buildings and facilities, and modify such buildings and facilities from time to time as it may deem necessary, and construct, acquire, provide, or arrange for such facilities and services (at project sites where such facilities and services are not available) for the housing, health, safety, welfare, and recreation of personnel employed by the Commission as it may deem necessary;

* * * * *

[42 U.S.C. 1946 ed., Sec. 1812.]

SEC. 15. (a) There is hereby established a Joint Committee on Atomic Energy to be composed of

nine Members of the Senate to be appointed by the President of the Senate, and nine Members of the House of Representatives to be appointed by the Speaker of the House of Representatives. In each instance not more than five members shall be members of the same political party.

(b) The joint committee shall make continuing studies of the activities of the Atomic Energy Commission and of problems relating to the development, use, and control of atomic energy. The Commission shall keep the joint committee fully and currently informed with respect to the Commission's activities. All bills, resolutions, and other matters in the Senate or the House of Representatives relating primarily to the Commission or to the development, use, or control of atomic energy shall be referred to the joint committee. The members of the joint committee who are Members of the Senate shall from time to time report to the Senate, and the members of the joint committee who are Members of the House of Representatives shall from time to time report to the House, by bill or otherwise, their recommendations with respect to matters within the jurisdiction of their respective Houses which are (1) referred to the joint committee or (2) otherwise within the jurisdiction of the joint committee.

[32 U.S.C. 1946 ed., Sec. 1815.]

SEC. 17. The Commission shall submit to the Congress, in January and July of each year, a report concerning the activities of the Commission. The Commission shall include in such report, and shall at such other times as it deems desirable submit to the Congress, such recommendations for ad-

ditional legislation as the Commission deems necessary or desirable.

[42 U.S.C. 1946 ed., Sec. 1817.]

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6 REVISED CODE OF WASHINGTON, 1951 (REVENUE ACT OF 1935, TITLE II, AS AMENDED):

DEFINITIONS

* * * * *

SEC. 82.04.050 *"Sale at retail," "retail sale."* * * *

The term "sale at retail," or "retail sale" shall include the sale of or charge made for tangible personal property consumed and /or for labor and services rendered in respect to the following: (1) The installing, repairing, cleaning, altering, imprinting, or improving of tangible personal property of or for consumers, excluding, however, services rendered in respect to live animals, birds, and insects; (2) the constructing, repairing, decorating, or improving of new or existing buildings or other structures under, upon, or above real property of or for consumers, including the installing or attaching of any article of tangible personal property therein or thereto, whether or not such personal property becomes a part of the realty by virtue of installation, and shall also include the sale of services or charges made for the clearing of land and the moving of earth to the extent necessary for such constructing or improving, unless the charge therefor is stated separately from other charges made in connection with the work performed, under such rules as the tax commission may prescribe; * * *

* * * * *

SEC. 82.04.070 *"Gross proceeds of sales."* "Gross proceeds of sales" means the value proceeding or accruing from the sale of tangible personal property and for services rendered, without any deduction on account of the cost of property sold, the cost of materials used, labor costs, interest, discount paid, delivery costs, taxes, or any other expense whatsoever paid or accrued and without any deduction on account of losses.

SEC. 82.04.110 *"Manufacturer."* "Manufacturer" means every person who, either directly or by contracting with others for the necessary labor or mechanical services, manufactures for sale or for commercial or industrial use from his own materials or ingredients any articles, substances or commodities. * * *

SEC. 82.04.120 *"To manufacture."* "To manufacture" embraces all activities of a commercial or industrial nature wherein labor or skill is applied, by hand or machinery, to materials so that as a result thereof a new, different or useful article of tangible personal property or substance of trade or commerce is produced and shall include the production or fabrication of special made or custom made articles.

SEC. 82.04.130. *"Commercial use."* "Commercial or industrial use" means the following uses of products, including byproducts, by the extractor or manufacturer thereof:

(1) Any use as a consumer; * * *

SEC. 82.04.140 *"Business."* "Business" includes all activities engaged in with the object of gain, benefit, or advantage to the taxpayer or to another person or class, directly or indirectly.

SEC. 82.04.150 *"Engaging in business."* "En-

gaging in business" means commencing, conducting, or continuing in business and also the exercise of corporate or franchise powers as well as liquidating a business when the liquidators thereof hold themselves out to the public as conducting such business.

* * * * *

SEC. 82.04.190 *"Consumer."* "Consumer" means the following:

(1) Any person who purchases, acquires, owns, holds, or uses any article of tangible personal property other than for the purpose of resale as tangible personal property in the regular course of business or for the purpose of consuming such property in producing for sale a new article of tangible personal property or a new substance, * * *

* * * * *

(4) Any person who is an owner, lessee or has the right of possession to or an easement in real or personal property which is being constructed, repaired, improved, cleaned, imprinted, or otherwise altered by a person engaged in business, excluding only the United States, the state and its political subdivisions in respect to labor and services rendered to their real property which is used or held for public road purposes.

* * * * *

RATE AND MEASURE OF TAX

SEC. 82.04.220 *Business and occupation tax imposed.* There is levied and shall be collected from every person a tax for the act or privilege of en-

gaging in business activities. Such tax shall be measured by the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be.

* * * * *

SEC. 82.04.240 *Tax on manufacturers.*. Upon every person * * * engaging within this state in business as a manufacturer; as to such persons the amount of the tax with respect to such business shall be equal to the value of the products, including byproducts, manufactured, multiplied by the rate of one-quarter of one percent.

The measure of the tax is the value of the products, including byproducts, so manufactured regardless of the place of sale or the fact that deliveries may be made to points outside the state.

SEC. 82.04.250 *Tax on retailers.* Upon every person engaging within this state in the business of making sales at retail; as to such persons, the amount of tax with respect to such business shall be equal to the gross proceeds of sales of the business, multiplied by the rate of one-quarter of one percent.

* * * * *

DEDUCTIONS IN COMPUTING TAX

SEC. 82.04.430 *Deductions enumerated.* In computing tax there may be deducted from the measure of tax the following items: * * *

(6) Amounts derived from business which the state is prohibited from taxing under * * * the Constitution or laws of the United States; * * *

* * * * *

* * * * *

SEC. 82.04.450 *Value of products, how determined.* The value of products, including byproducts, extracted or manufactured chall be determined by the gross proceeds derived from the sale thereof whether such sale is at wholesale or at retail, to which shall be added all subsidies and bonuses received from the purchaser or from any other person with respect to the extraction, manufacture, or sale of such products or byproducts by the seller, * * *

* * * * *

SEC. 82.04.500 *Tax not to be passed on.* It is not the intention of this chapter that the taxes herein levied upon persons engaging in business be construed as taxes upon the purchasers or customers, but that such taxes shall be levied upon, and collectible from, the person engaging in the business activities herein designated and that such taxes shall constitute a part of the operating overhead of such persons.

* * * * *

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IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1953

No. 335

GENERAL ELECTRIC COMPANY, a Corporation, and UNITED STATES OF AMERICA, *Appellants*,

v.

THE STATE OF WASHINGTON, *Appellee*.

BRIEF OF APPELLEE

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TABLE OF CONTENTS

	Page
PREFACE	1
OPINIONS BELOW	2
JURISDICTION	2
A. APPEAL OR CERTIORARI	2
B. APPEAL	3
C. CERTIORARI	7
COUNTER STATEMENT OF FACTS	8
A. PREFACE	8
B. FACTS	8
1. Construction of Contract—General	8
2. First War Powers Act	12
3. Advance Payments or Current Reimbursement	12
4. Uniqueness of Contract	15
5. Government Control of Appellant	16
(a) Controls were Normal	16
(b) Actual Detailed Control was Lacking	18
6. Consideration—Profit	21
(a) Materials Furnished by General Electric—Profit	21
(b) Rental of Contractor's Equipment—Profit	23
(c) Patent—Royalties	23
(d) Real Reason—Anticipated Profit	24
(e) The $1.00 Fee	24
(f) Other Benefits	25
7. Washington Taxes—Application to General Electric	26
SUMMARY OF ARGUMENT	27
A. ISSUES	27
B. SUMMARY OF ARGUMENT	30
1. Test is Legal Incidence	33
2. Federal Power to "Protect"	34
3. Legislative Repeal of Constitutional Rights	35
ARGUMENT—PART 1	36
I. IMPORTANCE OF THE QUESTION	36
II. DESCRIPTION OF THE WASHINGTON TAX	38
III. TENNESSEE TAXES IN CARSON CASE	42
IV. TENNESSEE JUDICIAL INTERPRETATIONS	47

TABLE OF CONTENTS—*Continued*

	Page
V. CONGRESS NEVER INTENDED TO EXEMPT INDEPENDENT CONTRACTORS	51
1. Preface	51
2. Executive Position	52
3. Established Position of Congress	57
4. Federal Use of Private Contractors	60
5. Use of Contractors Involve Definite Consequences	61
6. The History of Section 9(b)	62
A. Preface	62
B. Detailed History	63
7. Interpretation of the Act Itself	81
B. Government Agencies Uniformly Utilize Contractors	83
C. Activities	84
8. Conclusion Relative to Section 9(b)	86
VI. WASHINGTON HAS NOT ATTEMPTED TO BENEFIT AT FEDERAL EXPENSE	88
ARGUMENT—PART 2	90
VII. BASIC PRINCIPLES OF SOVEREIGN TAX IMMUNITY	90
1. Tests of Tax—General	93
2. Tax on Income a Tax on the Source	96
3. Tax a Burden	97
4. Interference with Government Functions	99
5. Economic Burden	101
6. Discrimination as a Test	107
7. "Protection" of Government Functions	109
8. Legal Incidence	110
VIII. TAXES APPLICABLE TO CONTRACTORS WITH THE FEDERAL GOVERNMENT—GENERAL	116
1. Real Property Taxes	116
2. Personal Property Taxes	116
3. Use Taxes	116
4. Sales Taxes	117
5. Net Income Tax	117
6. Gross Income or Gross Receipts, Franchise, etc., Taxes	118
7. Payroll Taxes	119
8. Summary	120

TABLE OF CONTENTS—*Continued*

Page

IX. OTHER STATE REGULATORY MEASURES. 124

X. CONCLUSION—PART 2 130

ARGUMENT—PART 3 131

XI. POWERS OF CONGRESS TO INVALIDATE STATE LAWS 131

CONCLUSION 144

APPENDIX 147

TABLE OF AUTHORITIES CITED

UNITED STATES CASES

Aberdeen Bank v. Chehalis County, 166 U. S. 440 (1896) 112

Alabama v. King & Boozer, 314 U. S. 1 (1941) 8, 9, 11, 12, 16-17, 31, 35, 42, 47, 52, 72, 88, 89, 97, 102, 103, 104, 107, 117, 131, 134, 147

Allan v. Bd. of Regents, 304 U. S. 439 (1938) 99

Alward v. Johnson, 282 U. S. 509 (1931) 51, 98, 107, 141, 149

Atkinson v. Tax Commission, 303 U. S. 20 (1938) ... 149

Arizona v. California, 283 U. S. 423 (1931) 100, 124

Baltimore National Bank v. State Tax Commission, 296 U. S. 538 (1935) 5

Baltimore Shipbuilding & Drydock Co. v. Baltimore, 195 U. S. 375 (1904) 116, 120, 150

Bank of Commerce v. New York City, 2 Black 620 (U. S. 1862) 108

Banks v. The Mayors, 7 Wall. 16 (U. S. 1868) 94

Bellsgap R. R. Co. v. Pennsylvania, 134 U. S. 232 (1889) 112

Board of Trustees v. United States, 289 U. S. 48 (1932) 136

Boske v. Comingore, 177 U. S. 459 (1900) 124

Buckstaff Co. v. McKinley, 308 U. S. 358 (1939) 33, 119, 141, 150

Burnet v. A. T. Jurgens Trust, 288 U. S. 508 (1933). 98

Burnet v. Coronado Oil Co., 285 U. S. 393 (1932) 96

UNITED STATES CASES—Continued

Page

California v. Pacific Railroad Co., 127 U. S. 1 (1888) 95
Carson v. Roane-Anderson Co., 342 U. S. 232 (1952) ..7, 9, 27, 31, 41, 42, 45, 46, 48, 50, 60, 83, 117, 133, 138
Central Pacific Railroad v. California, 162 U. S. 91 (1896) 98, 116
Choctaw Ong. R. R. Co. v. Mackey, 256 U. S. 531 (1921) 116
Citizens National Bank v. Durr, 257 U. S. 99 (1921). 6
City of Cleveland v. United States, 323 U. S. 329 (1945) 141
Coleman v. Miller, 307 U. S. 433 (1939)..... 6
Collector v. Day, 11 Wall. 113 (U. S. 1870)....94, 95, 136
Colorado Bank v. Bedford, 310 U. S. 41 (1940)..... 112
Colorado Co. v. Commissioner, 95 U. S. 259 (1877).. 114
Covington v. First National Bank, 198 U. S. 100 (1904) 112
Crew Levick Co. v. Pennsylvania, 245 U. S. 292 (1917) 118
Curry v. United States, 314 U. S. 14 (1941)..... .....52, 107, 117, 131, 150
Cuyahoga River Power Co. v. Northern Realty Co., 244 U. S. 300 (1917) 6

Dahnke-Walker Co. v. Bondurant, 257 U. S. 282 (1921) 6
Des Moines Savings Bank v. Fairweather, 263 U. S. 103 (1923) 112
Dobbins v. Erie County, 16 Pet. 435 (U. S. 1842).... .....98, 102, 109
Domenech v. National City Bank, 294 U. S. 199 (1935) 116

Educational Film Corp. v. Ward, 282 U. S. 379 (1931) 98, 141
Esso Standard Oil Co. v. Evans, 345 U. S. 495 (1935) 102, 152

Farmers' Bank v. Minnesota, 232 U. S. 516 (1914).. 98
Federal Land Bank v. Bismarck Lumber Co., 314 U. S. 95 (1941) 46, 93, 141, 152
Federal Land Bank v. Crosland, 261 U. S. 374 (1923) 141, 153
Felt & Tarrant Co. v. Gallagher, 306 U. S. 62 (1939). 113
Ferry v. King County, 141 U. S. 668 (1891)..... 6

UNITED STATES CASES—Continued

Page

Fidelity & Deposit Co. v. Pennsylvania, 240 U. S. 319 (1926) 98, 119, 120, 141, 143, 153
Flint v. Stone Tracy & Co., 220 U. S. 107 (1911) 136
Fox Film Corp. v. Doyal, 286 U. S. 123 (1932) 97
General Construction Co. v. Fisher, 295 U. S. 715 (1935) 117
Gillespie v. Oklahoma, 257 U. S. 501 (1922) ... 95, 96, 102
Grand Gulf R. R. and Banking Co. et al. v. Marshall, 12 How. 165 (U. S. 1851) 6
Graves v. New York ex rel. O'Keefe, 306 U. S. 466 (1939) 82, 94, 96, 97, 99, 106, 108, 132, 134, 135, 136, 154
Graves v. Texas Co., 298 U. S. 393 (1936) 102
Gromer v. Standard Dredging Co., 224 U. S. 362 (1911) 116
Group No. 1 Oil Corp. v. Bass, 283 U. S. 279 (1931) 98, 121
Gwin, White & Prince v. Henneford, 305 U. S. 434 (1939) 40
Hale v. State Board, 302 U. S. 95 (1937) 96, 97
Helvering v. Gerhardt, 304 U. S. 405 (1938) 95, 96, 98, 106, 108
Helvering v. Powers, 293 U. S. 214 (1934) 94
Helvering v. Producers Corp., 303 U. S. 376 (1938) 95, 96, 97, 98, 108, 155
Helvering v. Therrell, 303 U. S. 218 (1938) 113
Henneford v. Silas Mason Co., 300 U. S. 577 (1937) .. 116
Home Insurance Co. v. New York, 134 U. S. 594 (1890) 49, 98, 142
Home Savings Bank v. Des Moines, 205 U. S. 503 (1907) 92, 98, 105, 112
Indian Motorcycle Co. v. United States, 283 U. S. 570 (1931) .. 31, 41, 46, 48, 102, 104, 107, 117, 132, 135, 155
Indian Territory Oil Co. v. Board, 288 U. S. 325 (1933) 98
In re Neagle, 135 U. S. 1 (1889) 124
Irvine v. Spaeth, 314 U. S. 575 (1941) 5
Irwin v. Wright, 258 U. S. 219 (1922) 114
James v. Dravo Contracting Co., 302 U. S. 134 (1937) 35, 47, 51, 52, 72, 89, 97, 98, 105, 107, 118, 122, 131, 134, 143, 156
Jaybird Mining Co. v. Weir, 271 U. S. 609 (1926) ... 102

UNITED STATES CASES—Continued

Page

Jett Bros. Distilling Co. v. City of Carrollton, 252 U. S. 1 (1920) 4
Johnson v. Maryland, 254 U. S. 51 (1920) 124, 132
Lee v. Osceola Imp. Dist., 268 U. S. 643 (1925) 114
Liggett & Myers Co. v. United States, 299 U. S. 383 (1937) 119, 136, 141, 142
Lionberger v. Rouse, 9 Wall. 468 (U. S. 1869) 112
Long v. Rockwood, 277 U. S. 142 (1928) 96
Macallen Co. v. Massachusetts, 279 U. S. 620 (1929) 95, 98, 102, 133
Maricopa County v. Valley National Bank of Phoenix, 318 U. S. 357 (1943) 141, 158
Mason Co. v. Washington State Tax Commission, 302 U. S. 186 (1937) 40
Mayo v. United States, 319 U. S. 441 (1943) 141, 157
McCulloch v. Maryland, 4 Wheat. 316 (U. S. 1819) 2, 51, 90, 91, 95, 102, 107, 108, 131, 132, 133, 158
McGoldrick v. Berwind-White Coal Co., 319 U. S. 33 (1940) 113
Memphis Gas Co. v. Beeler, 315 U. S. 649 (1942) 4
Merchants' Bank v. Pennsylvania, 167 U. S. 461 (1897) 112
Metcalf & Eddy v. Mitchell, 269 U. S. 514 (1926) 97, 98, 117, 121, 141, 159
Miller v. City of Denver, 290 U. S. 586 (1933) 5
Miller v. Cornwall Railroad Co., 168 U. S. 131 (1897) 6
Missouri v. Gehner, 281 U. S. 313 (1930) 98, 102
Monamotor Oil Co. v. Johnson, 292 U. S. 86 (1934) .. 113
National Bank v. Commonwealth, 9 Wall. 353 (U. S. 1869) 98, 111
National Insurance Co. v. United States, 277 U. S. 508 (1928) 102
Nelson v. Montgomery Ward & Co., 312 U. S. 373 (1941) 141
Nelson v. Sears, Roebuck & Co., 312 U. S. 359 (1941). 141
New Brunswick v. United States, 276 U. S. 547 (1928) 113
New York ex rel. Cohn v. Graves, 300 U. S. 308 (1937) 96, 97, 125, 127
New York v. United States, 326 U. S. 572 (1945) 111

UNITED STATES CASES—Continued

Page

Northern Pacific R. R. Co. v. Traill County, 115 U. S. 600 (1885) 114
Northwestern Insurance Co. v. Wisconsin, 275 U. S. 136 (1927) 96
Ohio v. Thomas, 173 U. S. 276 (1898) 124
Oklahoma Tax Commission v. Texas Co., 336 U. S. 342 (1949) 160
Oklahoma Tax Commission v. United States, 319 U. S. 598 (1943) 125, 160
Osborne v. Bank of United States, 9 Wheat. 737 (U. S. 1824) 48, 100, 108
Pacific Co. v. Johnson, 285 U. S. 480 (1932) 108
Panhandle Oil Co. v. Mississippi ex rel. Knox, 277 U. S. 218 (1928) 31, 92, 97, 99, 117
Pembina Mining Co. v. Pennsylvania, 125 U. S. 181 (1888) 100
Philadelphia and Southern S. S. Co. v. Pennsylvania, 122 U. S. 326 (1886) 118
Pittman v. Home Owners Corp., 308 U. S. 21 (1939) 113, 141, 161
Pollock v. Farmers Loan & Trust Co., 157 U. S. 429 (1895) 48, 96, 136, 161
Railroad Co. v. Penniston, 85 U. S. 5 (Wall. 1873) 98, 116, 131, 161
Schuylkill Trust Co. v. Pennsylvania, 296 U. S. 113 (1935) 102
Scudder v. Comptroller of New York, 175 U. S. 32 (1899) 6
Silas Mason v. Tax Commission, 302 U. S. 186 (1937) 16, 35, 47, 89, 97, 131, 134, 163
Smith v. Davis, 323 U. S. 111 (1944) 81, 164
Smith v. Kansas City Title Co., 255 U. S. 180 (1921) 95, 141
South Carolina v. United States, 199 U. S. 437 (1905) 95
Stahmann v. Bidal, 305 U. S. 61 (1933) 113
Standard Oil v. Johnson, 316 U. S. 481 (1942) 6, 141
Taber v. Indian Territory Co., 300 U. S. 1 (1936) 98, 108, 116
Tennessee v. Davis, 100 U. S. 257 (1879) 124
Texas Co. v. Graves, 298 U. S. 393 (1936) 98

UNITED STATES CASES—Continued

Page

Thomson v. Pacific Railroad, 9 Wall. 579 (U. S. 1869) 51, 165
Trinityfarm Co. v. Grosjean, 291 U. S. 466 (1934) . 98, 104
U. S. Glue Co. v. Oak Creek, 247 U. S. 321 (1918) 118
United States v. Allegheny County, 322 U. S. 174 (1944) 6, 12, 84, 91, 92, 103, 110, 166
United States v. Rickert, 188 U. S. 432 (1902) 114
Van Brocklin v. Tennessee, 117 U. S. 151 (1886) 113
Van Slyke v. Wisconsin, 154 U. S. 581 (1871) 112
Veazie Bank v. Fenno, 8 Wall. 533 (U. S. 1869) 107
Wall v. Chesapeake & Ohio Ry. Co., 256 U. S. 125 (1921) 6
Western Union Tel. Co. v. Massachusetts, 125 U. S. 530 (1888) 95
Weston v. City Council of Charleston, 2 Pet. 449 (U. S. 1829) 48, 102, 133
Wheeler Lumber Co. v. United States, 281 U. S. 573 (1930) 119
Willcuts v. Bunn, 282 U. S. 316 (1931) 48, 95, 98, 108, 166
Wilson v. Cook, 327 U. S. 474 (1946) 5, 167
Wisconsin R. R. Co. v. Price County, 133 U. S. 496 (1889) 114
Yazoo Railroad Co. v. Thomas, 132 U. S. 174 (1889) . 81
Zucht v. King, 260 U. S. 174 (1922) 6

STATE CASES

Carbide & Carbon Chemical Corp. v. Carson, 192 Tenn. 150, 239 S.W. (2d) 27 (1951) 46, 48, 49
Coomber v. Justice Berks, 9 A. C. 61 (1883) 110
General Electric Co. v. State, 42 Wn. (2d) 411, 256 P. P. (2d) 265 (1953) 2
Hooten v. Carson et al., 186 Tenn. 282, 209 S.W. (2d) 273 (1948) 47
Klickitat County v. Jenner, 15 Wn. (2d) 373, 130 P. (2d) 880 (1942) 88
Morrow v. Henneford, 182 Wash. 625, 47 P. (2d) 1016 (1935) 45, 47

STATE CASES—Continued

Page

Rex v. Cook, 3 Tr. 519 (1790) 110
Standard Oil Co. v. Fontenot, 198 La. 644, 4 So. (2d) 634 (1941) 63, 81
State ex rel. Atwood v. Wooster, 163 Wash. 659, 2 P. (2d) 653 (1931) 135
United States v. Hart, Pet. C.C. 390, 5 Ops. Atty. Gen. 54 124

UNITED STATES STATUTES

Atomic Energy Act of 1946 ..... 28, 72, 128
Atomic Energy Act of 1946, section 4(c)(2), (42 U.S.C.A. § 1804(c) (2)) 13, 30, 82, 83, 145
Atomic Energy Act of 1946, section 9(b), (42 U.S.C.A. § 1809(b)) .....
..... 1, 2, 3, 4, 7, 29, 30, 31, 32, 33, 36, 49, 60, 62, 65, 68, 73, 75, 76, 78, 80, 82, 84, 85, 86, 114, 129, 138, 145
Ball Bill, S. 1557, 79th Cong., 1st Sess. 72
Buck Act, 4 U.S.C.A. (Supp.) §§ 105-110 58
Cochran Bill 59
Doughton Bill 57, 58, 59
Farm Credit Corporations, 12 U.S.C.A., § 1138 82
First War Powers Act of 1941, 50 U.S.C.A., § 611 ..... 9, 28
Federal Farm Loan Act, 12 U.S.C.A., §§ 701, 931, 932. 82
Federal Farm Mortgage Corporation, 12 U.S.C.A., § 1020(f) 82
Home Owners Loan Act of 1933, 12 U.S.C.A., § 1464(h) 82
Johnson Bill, S. 1824, 79th Cong., 2d Sess. 72
Judicial Code, § 237 (28 U.S.C.A., § 344) 6
Lanham Act, Public Law No. 849, 76th Cong., 3d Sess., 54 Stat. 1125 ..... 60, 67
Lanham Act (amended), 42 U.S.C.A., § 1521 67
May-Johnson Bill 31, 32, 56, 63, 65, 68, 69, 71, 72
McMahon Bill, S. 1717, 79th Cong., 1st Sess. 32, 71, 72
McMahon Bill, S. 1359, 79th Cong., 1st Sess. 72
Naval Appropriation Act of 1939, 53 Stat. 590 11
Naval Appropriation Act of 1940, 54 Stat. 400 ..... 11, 57
Public Law 137, 77th Cong., 1st Sess., c. 260, 42 U.S.C.A., §§ 1401-1593(e) 60
Public Law No. 262, 83d Cong., 3d Sess. 7, 36, 80

UNITED STATES STATUTES—Continued

Page

Public Law No. 588, 75th Cong., 3d Sess. (introduced as H. R. 9848) 58
Public Law No. 874, 81st Cong., 20 U.S.C.A. § 236.. 67
Reconstruction Finance Act, 15 U.S.C.A. § 607..... 82
Tennessee Valley Authority Act, 16 U.S.C.A. § 831-1 .....32, 67, 68, 75, 76, 85
28 U.S.C.A. § 1257..... 3
42 U.S.C.A. § 1801 62
42 U.S.C.A. § 1811 24

STATE STATUTES

Tennessee Laws of 1947, chap. 3, §§ 1328-1—1328-18. 42
Will. Tenn. Code § 1123.1..... 50
Will. Tenn. Code § 1248.1..... 50
Will. Tenn. Code (1951 Supp.) § 1248.40..... 50
Will. Tenn. Code § 1248.143..... 50
Will. Tenn. Code § 1316..... 50
Will. Tenn. Code (1951 Supp.) § 1328.25..... 43
Will. Tenn. Code (1951 Supp.) § 1328.26..... 43
Will. Tenn. Code (1951 Supp.) § 1328.26(d)..... 44
Will. Tenn. Code (1951 Supp.) § 1328.26(e)..... 44
RCW 82.04 .....3, 88
RCW 82.04.300 27
RCW 84.72.010 129
Rem. Rev. Stat. (1947 Supp.) § 7679(b)..... 37
Rem. Rev. Stat. § 8370-4 *et seq*.....15, 38
Rem. Rev. Stat. (1943 Supp.) § 8370-4(b)..... 26
Rem. Rev. Stat. (1943 Supp.) § 8370-4(g).....26-27, 39
Rem. Rev. Stat. (1943 Supp.) § 8370-6..... 39
Rem. Rev. Stat. (1945 Supp.) § 8370-12(f), (now RCW 82.04.430 (6))..... 4
Rem. Rev. Stat. (P. Supp.) § 8370-14.....39, 99
Rem. Rev. Stat. (1945 Supp.) § 8370-19..... 42
Rem. Rev. Stat. (1941 Supp.) § 8370-21..... 40
Rem. Rev. Stat. (P. Supp.) § 8370-199..... 23

CONGRESSIONAL HEARINGS AND REPORTS

Page

Hearings, Senate Sub-Committee on Appropriations, Navy Department Bill for 1941 (H. R. 8438)... 57
Hearings, House Committee on Military Affairs, October, 1945 (H. R. 4280)..... 63
Hearings, Special Senate Committee on Atomic Energy (S. 1717) part 1, January, 1946.....56, 74
Hearings, Special Senate Committee on Atomic Energy (S. 1717) part 4, February 1946..... 63
Hearings, Special Senate Committee on Atomic Energy (S. 1717) part 5, 79th Cong., 2d Sess., April 1946 77
Hearings, Joint Committee on Atomic Energy, Los Alamos Retrocession Bill and AEC Contract Policy, February, 1949..... 26
Hearings on Labor Relations Policy, Joint Committee on Atomic Energy, 81st Cong., 1st Sess., May 1949 19
Hearings, Joint Committee on Atomic Energy, part 8, June 1949 18-21
Hearings, Joint Committee on Atomic Energy, part 11, 81st Cong., 1st Sess., June 1949..... 37
Hearings, Joint Committee on Atomic Energy, part 14, 81st Cong., 1st Sess., June 1949..... 24
Hearings, Joint Committee on Atomic Energy, part 23, 81st Cong., 1st Sess., June 1949.....18, 139
Hearings, Joint Committee on Atomic Energy, 82d Cong., 2d Sess., April 1952.....37, 54
Hearings, Joint Committee on Atomic Energy, "State Taxation of AEC Contractors," 82d Cong., 2d Sess., April 1952.....73, 103, 118
House Rpt. No. 86, 79th Cong., 1st Sess..... 65
House Rpt. No. 1186, 79th Cong., 1st Sess..... 70
H. R. 4280, 79th Cong., 1st Sess.....63, 65, 70, 72
H. R. 4566, 79th Cong., 1st Sess.....65, 70, 72
H. R. 6049, 77th Cong., 1st Sess.....53, 55, 57
H. R. 6617, 77th Cong., 2d Sess..... 57
H. R. 6750, 77th Cong., 2d Sess.....54, 55, 57
H. R. 8438, 76th Cong., 3d Sess..... 57
H. R. 9848, 76th Cong., 3d Sess.....57, 58
Senate Rpt. No. 694 to accompany S. 671, 83d Cong., 1st Sess., July, 1953.....80, 83, 123
Senate Report No. 1211, 79th Cong., 2d Sess..... 77

CONGRESSIONAL HEARINGS AND REPORTS —Continued

Page

Senate Report No. 1654, 76th Cong., 3d Sess.....11, 57
Senate Report No. 1463, 79th Cong., 1st Sess.....64, 65
S. 1716, 76th Cong., 3d Sess.....11, 57
S. 1717 .....56, 72, 73, 74, 78
S. 1739 55
S. 3040 81
Senate Report No. 4024, 76th Cong., 3d Sess..... 57
86th Cong. Rec. 11401, 11402, 11404..... 58
86th Cong. Rec. 6681..... 11
86th Cong. Rec. 7448..... 11
86th Cong. Rec. 7535..... 11
86th Cong. Rec. 7648..... 11
86th Cong. Rec. 7827..... 57
86th Cong. Rec. 7956.....11, 57
86th Cong. Rec., part 7..... 57
92d Cong. Rec. 9469-70, 9556..... 78

MISCELLANEOUS

AEC Bull. GM-LEG-9, Serial No. 253.....37, 123
AEC Sixth Semiannual Report, July 1949, p. 194.... 18
Bulletin, National Tax Association (1929-1930).... 106
Exec. Order 9001, 50 U.S.C.A. App. p. 675..... 12
Exec. Order 9816, 12 Fed. Reg. 37, 42 U.S.C.A. at p. 808 10
Legislative History, Act of June 15, 1940, 54 Stat. 400 .....11, 57
Martin, Distribution of the Consumption Tax Load, 7 Law and Contemp. Prob..... 106
Miller, A Law is Passed—The Atomic Energy Act of 1946, 15 Univ. of Chicago Law Rev. (1948)....64, 71
Pierce, Should War Contractors and their Vendor be Immune from State Taxes? 27 Bulletin of the National Tax Association (May 1942)..... 58
U. S. Code, Cong. and Adm. News, No. 17, 83d Cong., 1st Sess., September 1953.....37, 56
1 Willoughby, Const. Law (2d ed. 1929)..... 136
51 Yale Law Review (1941-1942)..... 136

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1953

No. 335

GENERAL ELECTRIC COMPANY, a Corporation, and UNITED STATES OF AMERICA, *Appellants*,

v.

THE STATE OF WASHINGTON, *Appellee*.

BRIEF OF APPELLEE

PREFACE

The problem is whether section 9(b) of the Atomic Energy Act, 42 U. S. C. A. § 1809(b), exempts a private corporation for gain from the Washington gross income tax. The corporate income involved is from the performance of an AEC contract and it is admitted that the corporation is independent and not an agent, and the tax is constitutionally valid. The tax is not imposed upon transactions but is statutorily made a part of the cost of doing business.

The question is previously unanswered. We think it vital and have so treated it.

> "The constitution of our country, in its most interesting and vital parts, is to be considered; the conflicting powers of the government of the Union and of its members, as marked in that constitution, are to be discussed; and an opinion given, which may essentially influence the great operations of the government." *Mcculloch v. Maryland*, 4 Wheat. 316 at 400 (U. S. 1819).

OPINIONS BELOW

The memorandum opinion of the Washington State trial court is found at R. 9. The *en banc* opinion of the State Supreme Court (R. 25-46) deciding that section 9(b) did not apply to gross income or receipts taxes is reported at 42 Wn.(2d) 411, 256 P.(2d) 265 (April 14, 1953). The Petition for Rehearing (R. 47-49) was denied May 18, 1953, 42 Wn.(2d) 432, 256 P.(2d) 265.

JURISDICTION

A. Appeal or Certiorari

Appellants urge that this court may take jurisdiction of this cause—with this we agree. They further contend that appeal is the proper avenue for review—this we deny. Apparently they feel that by "appeal" they may present issues either waived in or not presented (see R. 48) to the state court. The

assignments of "error" (R. 53-54) indicate such a plan.

It would be an unusual procedure at best which permitted a party to admit an issue to the state court and then condemn the concurrence of the court as error here.

B. APPEAL

Final judgments of state courts may be here reviewed on appeal:

> "where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity." 28 U. S. C. A. § 1257(2).

The complaint of General Electric (R. 1-6) later adopted by the intervenor alleged

(1) the *tax* was unconstitutional;

(2) the *tax* violated section 9(b) of the Atomic Energy Act; and

(3) that Title II of the Washington Revenue Act of 1935 (now RCW chap. 82.04) (consisting of 52 separate and distinct statutes, probably 50 of which are not here involved) as applied to the General Electric Company was "invalid" under the (a) federal Constitution generally, (b) under section 9(b), and (c) under the due process clause.

No statute has even yet been claimed to be invalid. We presume the reason is that the Washington law provides the tax shall not apply to

> "Amounts derived from business which the state is prohibited from taxing under the constitution of this state or the constitution or laws of the United States;" Rem. Rev. Stat., § 8370-12(f) (1945 Supp.) (now RCW 82.04.430(6)).

On appeal to the State Supreme Court, the appellants, in their joint brief, admitted and waived certain issues. They admitted, as they must, that except for section 9(b) the tax was valid. They should not be heard to urge otherwise here. A short paragraph from page 30 of that brief is indicative:

> "* * * the respondent [General Electric Company and the United States] concedes (1) that, but for Section 9(b), the taxes here in question were applicable to the respondent and imposed upon it by Title II * * * and (2) that the respondent is an independent contractor, not an agent of the Commission.
>
> "We also agree with the appellants' contention (Br. 20-26) that generally independent contractors with the federal government are subject to state and local taxation."

An attack on the validity of a tax does not support appeal jurisdiction. This court in *Memphis Gas Co. v. Beeler*, 315 U. S. 649 at 650 (1942) states:

> "Our decisions have long since established that an attack upon a tax assessment or levy, upon the ground that it infringes a taxpayer's federal rights, privileges or immunities, will not sustain an appeal under § 237(a). *Jett Bros. Distilling Co. v. City of Carrollton*, 252

U. S. 1 [1920]; *Miller v. City of Denver*, 290 U. S. 586 [1933]; *Baltimore National Bank v. State Tax Comm'n*, 296 U. S. 538 [1935]; *Irvine v. Spaeth*, 314 U. S. 575 [1941]. It is not enough that an appellant could have launched his attack upon the validity of the statute itself as applied: if he has failed to do so we are without jurisdiction over the appeal."

This court in *Wilson v. Cook*, 327 U. S. 474 (1946), comprehensively analyzed this identical situation. Arkansas had imposed its severance tax upon the cutting of national forest timber. The independent contractor-cutter asserted the immunity of the federal government. The court states at 327 U. S. 480-483:

> "The record in this case does not disclose that at any time in the course of the proceedings in the state courts plaintiffs asserted the invalidity of a state statute on any federal ground. The bill of complaint in the chancery court set up only that the demand of the state for the tax 'is an illegal and void exaction' and 'is in violation of' Art. IV, § 3, cl. 2 and of Art. VI, cl. 2 of the Constitution. * * *
>
> "* * * The [lower] court considered only the validity of 'the tax,' not that of the statute.
>
> "* * * Being asked to enjoin the collection of the tax, the state court contented itself with holding that the tax, which was assessed on plaintiffs and not the government, imposed no burden on the government which

infringed its implied constitutional tax immunity. * * *

"In order to support an appeal to this Court it is necessary that the *validity* of the *state* taxing *statute* be either presented to the state court or decided by it. It is not sufficient merely to attack, as here, the tax levied under the statute, or 'the right to collect the tax' which has been levied, or to show that the validity of the tax alone had been considered. * * * [Emphasis supplied.]

"Since plaintiff's attack is directed to the validity of the tax as laid, and not to the validity of the statute, as applied, we are without jurisdiction of their appeal under § 237 of the Judicial Code, 28 U. S. C. A. sec. 344, 8 F. C. 8 Title 28, sec. 44." [1]

The cases of *Dahnke-Walker Co. v. Bondurant*, 257 U. S. 282 (1921); *Standard Oil v. Johnson*, 316 U. S. 481 (1942); and *United States v. Allegheny County*, 322 U. S. 174, 191 (1944), either involved the validity of a specific state statute or the issue does not appear to have been particularly raised.

---

[1] See also *Coleman v. Miller*, 307 U. S. 433, 438 (1939): "As the validity of a state statute was not assailed, the remedy by appeal was not available"; *Miller v. Cornwall Railroad Co.*, 168 U. S. 131, 133-134 (1897); *Scudder v. Comptroller of New York*, 175 U. S. 32 (1899); *Wall v. Chesapeake & Ohio Ry. Co.*, 256 U. S. 125, 126 (1921); *Citizens Nat. Bank v. Durr*, 257 U. S. 99, 106 (1921); *Zucht v. King*, 260 U. S. 174, 176, 177 (1922); *Cuyahoga River Power Co. v. Northern Realty Co.*, 244 U. S. 300, 304 (1917); *Ferry v. King County*, 141 U. S. 668, 673 (1891); and *Grand Gulf RR and Banking Co. et al. v. Marshall*, 12 How. 165, 166 (U. S. 1851).

The validity of a state statute cannot be involved here unless reversal will invalidate.

An appeal does not lie but certiorari may.

C. Certiorari

Section 9(b) has been amended to eliminate any reference to tax exemptions.[3] Since this section only is involved, the court is called upon to construe a now dead statute. The importance of the case for purposes of certiorari can lie only in the money involved. This probably approximates 1.6 plus millions in Washington. The tax liability of subcontractors (suppliers, etc.) who are independent contractors of an independent contractor, are *not* involved. Appellants' Statement of Jurisdiction (p. 14) is the first indication that anyone so construed the issues. Certainly it did not appear in the lower courts.

Appellants state that a dispute with Indiana involving 1.9 millions will be resolved by this case. This we can neither affirm nor deny. We do deny, however, that a sales and use tax dispute with Ohio is relevant (1.3 millions), that having been the issue in *Carson v. Roane-Anderson Co.*, 342 U. S. 232 (1952), a decision we do not contest.

We do not deny that certiorari may well be granted. However, if the importance of the issues determines, they should be presented to the Court in their proper context.

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[3] Public Law 262, 83d Cong., 1st Sess.

COUNTER STATEMENT OF FACTS

A. PREFACE

The issue is whether section 9(b), without alteration of the contractual relationship, changed the status of General Electric Company from admittedly taxable to exempt.[3]

The relationship involved is determined by the written contract (Exh. 3, R. 208 adm. R. 64). Since the contract is unambiguous (R. 60) and both parties abided its terms, its provisions control, *Alabama v. King & Boozer*, 314 U. S. 1 at 9 (1941). The State Supreme Court's decision reversed the lower court and was based on a construction of the contract, 42 Wn. (2d) at 414, 415 (R. 27, 28) and thus the findings of the trial court were held ineffectual except as they coincided with the contract.

B. FACTS

1. Construction of Contract—General

After extended examination of the contract under state law, all nine members of the State Supreme Court agreed that

> "Reduced to its simplest form, we have a business corporation engaged in manufacturing

[3] The contract was executed May 15, 1946 and taxes of $8,965.55 were paid for the period prior to the effective date of the Atomic Energy Act. The appellants admitted liability for this tax and failed to cross-appeal the trial court's denial of the refund. (R. 20.)

a high explosive and delivering its product to a governmental agency. Our statute authorizes the imposition of a business and occupation tax for the privilege of carrying on such an activity in this state. The facts that respondent uses buildings and facilities of the agency, that by contract it has submitted to certain supervision, and that special fiscal arrangements are provided for, do not make such activities those of the agency, nor do they make respondent such an instrumentality of the United States or of the agency that it is immune, expressly or impliedly, from the business and occupation tax." 42 Wn. (2d) at 416 (R. 29). (The three judge dissent was based on *Carson v. Roane-Anderson.*)

On May 15, 1946, General Electric, a New York corporation doing business in the State of Washington, contracted with the Army (Corps of Engineers) to construct facilities and operate what can be simply described as a plutonium factory and a company town. The contract was pursuant to the First War Powers Act of 1941 (50 U. S. C. A., § 611 *et seq.*) which authorized literally thousands of other similar defense contracts (R. 91-92, 145-147)[4] during the war years. Performance commenced on September 1, 1946.

---

[4] The striking similarity of Exhibit 3, the General Electric contract, to the contracts involved in *Alabama v. King & Boozer*, can be seen by comparison (No. 602, 1941 Term).

The nature of the contract under both federal and state law must be judged as of the date of its execution. The Atomic Energy Commission took over such contracts on January 1, 1947.[5] It made no amendments of note. General Electric was and is an admitted (R. 48) independent contractor. This is not an empty title. It designates a relationship with specific consequents. Not only taxes are affected but liability relations with third parties, materialmen, suppliers and employees are controlled by the relationship. Workers' disability and employment benefits provided by states are vitally involved.

General Electric in entering into subcontracts could incur liability solely in its own name. It was without express or implied power to pledge the credit of the government (Art. XIX, R. 222, R. 64). Its purchases were specifically made for "resale" to the government. The requests to sellers (subcontractors) for price quotations (R. 127, 234) provided in part:

> "This purchase is made for resale to the United States Government."

Further,

> "Nothing contained herein shall bind or purport to bind the United States Government."

---

[5] Exec. Order 9816, 12 Fed. Reg. 37, 42 U. S. C. A. at p. 808. The contract was formally adopted January 28, 1947 (R. 11).

These identical quotations are part of the terms of the purchase order (R. 127, 238).

The contract was executed when *Alabama v. King & Boozer*, 314 U. S. 1 (1941) delineating tax boundaries was fresh and Congress and the Executive had steadfastly refused all efforts to permit federal agencies to enter relationships with their contractors which would avoid state taxes. In 1941, the War, Navy and Maritime Departments had pressed for legislation authorizing them to constitute their contractors agents for the sole purpose of avoiding state sales and use taxes (R. 164-165).[6]

---

[6] See the legislative history of the 1941 Naval Appropriation Act. Section 4 of the Act of April 25, 1939 (53 Stat. 590, 592) authorized military establishments to negotiate cost-plus-fixed fee contracts, and an amendment designed to constitute the contractor an agent of the United States and which declared purchases exempt from state and local taxes was defeated, see S. Report No. 1654, 76th Cong., 3d Sess. The amendment was adopted by the Senate, 76th Cong., 86 Cong. Rec. 6681. The House deleted the provision, 76th Cong., 86 Cong. Rec. 7535, and the Senate concurred, 86 Cong. Rec. 7648.

See also the legislative history of the Act of June 15, 1940, 54 Stat. 400, authorizing the construction of naval aircraft and works. Section 4 authorized the use of cost-plus-fixed-fee contracts and the Senate agreed without debate to a committee amendment proposed without explanation (see S. Report No. 1716, 76th Cong., 3d Sess.) providing such contractors to be agents to avoid sales and use taxes (86 Cong. Rec. 7448). The provision also was eliminated, see 86 Cong. Rec. 7956.

2. First War Powers Act

This contract, as other wartime cost-plus-fixed-fee contracts, was negotiated pursuant to the First War Powers Act and is little different. Secrecy controls were perhaps more strict, understandably (R. 57), but cost controls and purchase provisions were "essentially the same" (R. 91).

Other war contractors also were paid or "received their costs" in advance (R. 156-157) under a similar arrangement. The identical nature of this contract and those involved in *Alabama v. King & Boozer*, *supra*, as well as federal contracts generally, disclose it to be of a rather standard form. "Uniqueness" might well have endangered secrecy. Further, we note that the government is not averse to using the "one dollar" provision, see *United States v. Allegheny County*, 322 U. S. 174 (1944) and the Navy contract with Seattle-Tacoma Shipbuilding Company (R. 147).

3. Advance Payments or Current Reimbursement

Government agencies were authorized to make advance and progress payments by the First War Powers Act and Executive Order.[7] As is well known,

[7] Executive Order 9001, see note 50 U. S. C. A. App. p. 675. "Current reimbursement" was also found in *Alabama v. King & Boozer*, *supra*. The government paid the contractor on submission of payrolls, etc. (R. 57, 60, No. 602, 1941 Term.)

payments in advance were not only common during the war period, but were necessary financing arrangements where large expenditures were involved.

The Atomic Energy Act also permitted operating contractors to be paid in advance. Section 4(c)(2) clearly delineates the permissible contractual relationship. It provides:

> "The Commission is authorized to make, or or to continue in effect, contracts with persons obligating them to produce fissionable material in facilities owned by the Commission. * * *
>
> "Any contract entered into under this section shall contain provisions (A) prohibiting the contractor with the Commission from subcontracting any part of the work he is obligated to perform under the contract, except as authorized by the Commission, and (B) obligating the contractor
>
> "[1] to make such reports to the Commission as it may deem appropriate with respect to his *activities* under the contract,
>
> "[2] to submit to frequent inspection by employees of the Commission of all such [contractor's] *activities*, and
>
> "[3] to comply with all safety and security regulations which may be prescribed by the Commission. * * *
>
> "Partial and advance payments may be made under such contracts." (Enumeration and Emphasis Supplied.) 42 U. S. C. A. § 1804-(c)(2).

The distinction between the activities of the contractor and the Commission is clearly drawn. Where a contractor is involved, the Commission's "activities" consist of current examinations of and payment for the contractor's activities.

Article XV of the contract (R. 64, 220) permits the government, at the request of General Electric, to make payments in advance. Security is a "condition precedent." General Electric then deposited the payment in a bank or banks of its own choice, the only limitation being that the bank must be a federal reserve member or be federally insured. These payments were retained in an account separate from its other accounts (R. 221). The contract provided:

> "The government shall have a lien upon such balances to secure the repayment of such advances * * *." (R. 221.)

Checks on this account to pay General Electric's debts were in the name of General Electric, the government nowhere appearing (Exhs. 10 and 11, R. 231 adm. 98-99). General Electric regularly submitted vouchers for "reimbursement" for monies expended.

There is no magic in this contractual arrangement. Whether such will be claimed remains to be seen.

4. Uniqueness of Contract

In the course of these proceedings, it has been "off-again, on-again" argued that this contract is extremely "unique." A "unique" rule of law is presumably required. (The feeling is apparently extant that anything related to atomic energy is "unique.") This contention would seem completely answered by appellant's own admission:

> "For the purpose of the instant case, the respondent concedes (1), but for section 9(b), the taxes here in question were applicable to the respondent and imposed upon it by Title II, Chapter 180, Laws of 1935, (Rem. Rev. Stat. §§ 8370-4, *et seq.*) and (2) that the respondent is an independent contractor, not an agent of the Commission. (Apps.' Br. 30.)

The sole difference between this and other war contracts that we can point to with any degree of certainty is that this deals with a new and provocative rather than a conventional and less interesting type of explosive. From what information we can obtain, the amount of money expended was surprisingly small in relation to the tremendous outlays each on contracts for guided missiles, tanks, aircraft, radar, battleships, aircraft carriers, research, as well as for such mundane military necessities as mess kits, food and clothing.

5. Government Control of Appellant

Although not argued below, we anticipate appellants to contend that General Electric, because of the "controls" under which it operated was but the alter ego of the government. Mention of such controls would seem immaterial since they could only be used to argue that General Electric is not as independent as both it and intervenor admit.

(a) Controls Were Normal:

Three types of controls exist: (1) security, (2) cost, and (3) operational. The necessity for security in defense contracts is clear. The requirement of cost controls in cost-plus contracts should need no elaboration. Operational controls were normal as far back as *Silas Mason v. Tax Commission*, 302 U. S. 186 (1937), which upheld this same Washington tax.

In other words, controls dealing with security, personnel, cost accounting, purchases and expenditures, and other fiscal relations were normal and proper for a cost plus contractor (R. 91, 145-147). In general, the contract provisions are as follows (they are almost identical to those found in *Alabama v. King & Boozer*):

(a) General Electric shall furnish labor, materials, work, etc. (See also 314 U. S. at p. 10);

(b) The government shall "reimburse" General Electric for its costs including taxes (see also 314 U. S. at p. 10);

(c) Title to materials purchased by the General Electric Company passes to the government upon delivery to the contractor and acceptance by the contracting officer (314 U. S. at p. 10);

(d) The government reserves the right to furnish satisfactory materials (314 U. S. at p. 10);

(e) The government may directly pay subcontractors and for all materials, labor, freight, etc. (314 U. S. at p. 10);

(f) The government shall assume all obligations of General Electric at the termination of the contract (314 U. S. at p. 11);

(g) All subcontracts must be assignable to the government (314 U. S. at p. 11);

(h) All subcontracts over $2,000.00 are required to be in writing (314 U. S. at p. 11);

(i) All purchases over $500.00 must be specifically approved in advance by the government's contracting officer (314 U. S. at p. 13);

(j) The decisions of "whether to buy and what to buy" are made by the government (314 U. S. at p. 13);

and the important element:

(k) General Electric must
"make all such contracts in its own name, and not bind nor purport to bind the Government or the Contracting Officer thereunder" (see also 314 U. S. at p. 11).

(b) Actual Detailed Control Was Lacking:

To forestall the expected contention that despite its "technical" relationship of independent contractor, General Electric was in fact minutely controlled by the AEC in every detail, the following should be brought to light.

> It was not until early 1949, that the AEC
>
> "approve[d] in advance all such expenditures as [were] made." [8]

by General Electric. The actual relation of the AEC and the appellant is succinctly stated in a 1949 Report to the Joint Congressional Committee on Atomic Energy as:

> "The Atomic Energy Commission acts in the capacity of a general policy making and supervisory group over the activities of the General Electric Company, who in turn are prime contractors responsible for the construction, operation, and management of all facilities and work within the project."[9]

The declared aims of the AEC are:

> "Consistent with the Commission's responsibility under the law the least possible governmental interference with the efficient management expected from the AEC Contractors;"[10]

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[8] Statement of Mr. H. W. Winne, General Electric Vice-President in charge of Engineering, Hearings, Joint Committee on Atomic Energy, part 8, June 15, 1949, p. 335.

[9] Report to Joint Committee, Appendixes to Hearings, 81st Cong., 1st Sess., part 23, p. 1183.

[10] AEC, Sixth Semiannual Report, July 1949, p. 194.

Further,

> "The government is the owner of the property, the contractor the hired man."[11]

In 1949 Congress specifically investigated the *lack* of AEC control over General Electric at Hanford. A report to it was made by Walter Williams, AEC Production Director; Paul Green, AEC Comptroller; and Adrian Fisher, AEC General Counsel.[12] The report disclosed there were *no* inventory controls set up on a particular project at Hanford. Quotations[13] from that report are clarifying.

> "* * * yet it does not appear that any AEC representative reviewed this estimate [by General Electric] or even the methods of compiling it. * * *
>
> "* * * *any* review by the AEC of the basis on which this estimate was prepared would have indicated that it was not reliable no matter how heavily endorsed by the General Electric Company.
>
> "Yet it does not appear to have been clearly understood in the AEC and Hanford the extent to which this estimate or the manner in which it was prepared should be reviewed by the AEC

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[11] Hearings on Labor Relations Policy, Joint Committee on Atomic Energy, 81st Cong., 1st Sess., May 3, 1949, p. 2; see also pp. 4-5 and 22-28.

[12] See Hearings, AEC Joint Committee, 81st Cong., 1st Sess., part 8, June 15, 1949, p. 330.

[13] Report, p. 25, Hearings, *Ibid*, p. 330.

or precisely whose responsibility it was in the AEC to review the estimate.

"In part the Hanford office appears to have been influenced by the Commission-wide policy, which is opposed to any detailed supervision of the contractor's work. This policy, however, should not have prevented the AEC officials from satisfying themselves as to the adequacy of the General Electric Co.'s organization and procedure for estimating costs.

* * * * * * * *

"There seems to have been no clear understanding either in the General Electric Co. or in the Atomic Energy Commission as to whose responsibility it was to follow the costs. As a result, responsibility for failure to use what cost reports were available rests with the top Hanford management of the General Electric Co. and the Atomic Energy Commission."[14]

These mistakes

"can be attributed only to a lack of real capacity on the part of the company at Hanford to handle construction projects on this magnitude or a lack of concern for costs or both."[15]

Mr. David Lillianthal agreed that detailed control, checks upon, or supervision of General Electric was emphatically *not* the policy of the Commission.[16]

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[14] Hearings, *Ibid.* pp. 331-332.

[15] Hearings, *Ibid.* p. 332, Report p. 42.

[16] Hearings, *Ibid*, p. 338.

Mr. Carlton Shrugg, AEC Deputy Manager at Hanford testified that the AEC only had

> "roving field inspectors not tied down to any one spot, but who did have the opportunity to look at anything and did have the chance to find out as much as they were smart enough to find."[17]

These disclose that General Electric was as independent in fact as it is admitted to be in law. We mention the above, emphatically not to deprecate either the AEC or General Electric Company, but to place the control factor in its true and proper light.

6. Consideration—Profit

Appellants have strongly contended that profit to General Electric was completely lacking. We presume the contention will be again urged. The only discernable inference from this contention is that it in some way creates an agency rather than independent status. The "lack of profit" argument lacks merit for several reasons: (1) a definite present monetary profit was specifically provided in the contract; and (2) the issue here will govern the gross income tax liability of other prime contractors who admit to be in business for profit.

The consideration received by General Electric is severally divisible as:

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[17] Hearings, *Ibid*, part 12, June 21, 1949, p. 517.

(a) Materials Furnished by General Electric—Profit:

Appellant is well known as one of the largest existing commercial sales organizations in the United States if not the world. It was permitted to and did furnish its own materials in performing the contract. Art. II, sec. 11 (R. 211), provides:

> "In carrying out the work under this contract, the Contractor shall be free, but shall not be obligated to use any materials, supplies, and equipment of its own manufacture, or manufactured by its affiliates and/or services described in paragraph 2(d) of Article XIII, upon advising the contracting officer in advance."

The price must be the normal sales price and

> "* * * it being understood that such prices will normally include a reasonable profit to the Contractor." (R. 214-215.)

Undisclosed is the amount of such

> "products, materials, equipment and supplies, together with services requiring the use of facilities (such as processing, testing, analyzing, etc.)" Art. XIII, sec. 2(d) (R. 214).

supplied at a profit. It could be but a small percentage yet result in a very impressive dollar figure.

Whether all of General Electric's sales, the income from which they claim exemption, were to the Government is doubtful. The DuPont tax return (Exh. 25, R. 264A-264B) introduced as and stipulated as a typical return of both companies (R. 180)

disclosed that a substantial amount of sales were made to purchasers *other than* the Government. There is no segregation of the income from federal and non-federal sales in the claim for refund. In suits for refund:

> "The burden shall rest upon the taxpayer to * * * and to establish the correct amount of the tax." Rem. Rev. Stat. § 8370-199 (P. Supp.).

As to these sales, whatever amount they might be, we have one independent contractor selling to another for profit. To anticipate our argument, how can this be an activity of the AEC?

The government could obtain a competitor's products if advantageous price-wise (Art. II, sec. 11, R. 211), and *if* satisfactory to General Electric Company (Art. XIII, sec. 9(a), R. 218).

(b) Rental of Contractor's Equipment—Profit:

General Electric's use of its own facilities and equipment was compensated at a rate which also included a "reasonable profit" (Art. XIII, sec. 2(d), R. 214). Government rental of General Electric's facilities and equipment for General Electric's use in performing the contract apparently falls within the same category (Art. XIII, sec. 5(g), R. 217).

(c) Patent—Royalties:

Royalties are expected by General Electric from

the use by others of patents developed by it, although they

"do not look for much profit,"[18]

The Atomic Energy Act provides that where a device is invented by any private person or industry for the use of atomic power, it may be compulsorily licensed for use, in return for royalties either agreed upon or in the event of failure to agree, set by a board appointed by the Commission from which there would be appeal to the Circuit Court of Appeals. (Hearings, note 18, pp. 601-602; 42 U. S. C. A. § 1811; and Contract, Art. XXXVII (R. 223-224)).

(d) Real Reason—Anticipated Profit:

At the Joint Committee hearings, Mr. H. W. Winne, General Electric's Vice-President, testified that the "main reason" that appellant had gone "into this project at all" was

> "* * * because we are an electrical-manufacturing company; and the more readily electric power is available to everybody, the more chance we have to sell our products." Hearings, note 18, *supra*, at p. 602.

(e) The $1.00 Fee:

The purpose of including "$1.00" escapes us. The capable drafters of a contract involving hun-

[18] Testimony of H. W. Winne, General Electric Vice-President in charge of Engineering, Hearings, Joint Committee on Atomic Energy, part 14, June 23, 1949, 81st Cong., 1st Sess., p. 602.

dreds of millions could not have seriously contemplated that this antiquated formalism could in itself be "adequate consideration." Since such a provision could neither have nor be intended to have any legal effect, it could only have been included for publicity or public good will purposes.

(f) Other Benefits:

Unmentioned in the contract as consideration is (1) the inestimable value of the public good will created by the inaccurate but oft-cited "one-dollar" phrase and (2) that General Electric, through its employees and technicians is getting in on the "ground floor" of a research program in not only an extremely advanced but secretive field. The competitive advantage over other companies who were denied this opportunity is immeasurable, particularly in view of the recent public announcements that atomic energy will be released for civilian peacetime purposes as soon as internationally feasible. This factor was not overlooked in the above mentioned 1949 hearings. Senator Brien McMahon[19] stated at p. 601:

> "* * * of course the General Electric naturally will secure a great advantage over anybody else in the electrical-manufacturing industry if and when this power becomes useful for peacetime pursuits."

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[19] Chairman, Joint Committee on Atomic Energy.

To dwell over long upon General Electric's profit is to miss the issues. A specific profit was contemplated and cannot be denied. However, and more important, contractors presently dealing with the Atomic Energy Commission, in lump sum competitive bid contracts are engaged in business for private gain.

> "The number of our prime contractors is in the hundreds."[20]

General Electric itself in 1949, was negotiating for an overall fee, and the AEC was agreeable.[21] We are not advised if a fee other than the one dollar was negotiated since the time of trial, May 1949.

7. Washington Taxes—Application to General Electric

Washington taxes are self-assessed. General Electric paid the taxes it here seeks to recover under the category it determined applicable—retailing. The contracts however (not made available until shortly before trial—R. 165) disclose that income from other business activities and under different tax classifications, wholesaling at ¼ of 1%—possibly manufacturing at ¼ of 1%—Rem. Rev. Stat., § 8370-4(b) (1943 Supp.) and possibly "service" or the "catch-all" section at ½ of 1%—Rem. Rev. Stat., § 8370-

[20] Hearings, Joint Committee on Atomic Energy, Los Alamos Retrocession Bill and AEC Contract Policy, February 17, 21, and 24, 1949, p. 49.

[21] Hearings, *Ibid*, at p. 63.

4(g) (1943 Supp.). These taxes are not cumulative. They are designed to cover all business activities but impose but one tax relative to each product, see RCW 82.04.300. The total effect is a tax on gross business income.

Rental and other income from the company town in which General Electric was designated agent was not included in the measurement of the tax. We feel as did government counsel (R. 165) that the agency provision was invalid.

SUMMARY OF ARGUMENT

A. Issues

We find no quarrel with the decision in *Carson v. Roane-Anderson*, 342 U. S. 232 (1952). Its holding has been our own relative to sales and use taxes since at least 1941 (R. 143, 250).

The following postulates are enumerated in order to clearly delineate the issues:

1. General Electric is an independent contractor. This, and thus the incidents which flow therefrom, are admitted.

2. As such, it was required by contract to purchase materials and otherwise subcontract, hire employees, etc., in its own name. It in no way could bind the Government. Many of its purchases were resold to the Government. Some goods were sold to

others. Some were used in the performance of its contract.

3. General Electric Company is not nor was it contended to be in the state court an agency or instrumentality of the Government.

4. General Electric and the Army entered into this contract under the First War Powers Act of 1941. Agency relationships had not been authorized by Congress—permission to enter such relationships had been specifically refused.

5. The Atomic Energy Act of 1946 did not purport to change or modify existing contracts, but to accept them as they were. It does not grant power to create "agents." The AEC accepted the contracts with only minor amendments.

6. The Washington tax is upon (a) persons, (b) measured by gross income. It is nondiscriminatory, of minute percentage and is no burden upon Federal operations. The revenue from this tax is used and needed to supply the tangible and intangible benefits of government necessary to enable General Electric to perform its contract.

7. There has been no contention in this case that the tax is either a burden upon or an interference with Federal functions.

8. Both appellants admitted before the state court that the tax would be constitutionally valid

except for section 9(b) of the Atomic Energy Act. Error cannot now be assigned to the state court for accepting that admission (Assignment 6, R. 54).

9. By both statute and this court's decision, the complete legal incidence of this tax is a part of the cost of business, not designed to be passed on. It is upon a person (not contracts) admittedly separate and independent from, and not an instrumentality of the Federal government.

10. As the tax is no burden upon Federal operations, its *sole* effect upon the Government lies in its economic incidence. There is thus no difference between this tax and the economic burden of many other state taxes passed on through each link in the economic chain to the ultimate consumer—here the Government.

11. General Electric Company is a private corporation organized pursuant to state law, for gain. It received a present and anticipated profit from its operations as contractor completely free, according to appellants, from normal tax obligations. A tax on gross income includes net income and thus unless section 9(b) prohibits net income taxes as well, General Electric's profit is taxable. The burden of segregation is upon General Electric.

12. The only difference between a net income and gross income tax is the amount of economic burden passed on.

B. Summary of Argument

Section 9(b) exempted the "property, income, and activities" of the AEC. All three, under normal construction, are already exempt by our Constitution. It is conceptually impossible that the acts ("activities") of one entity be the acts ("activities") of an independent entity except as to the execution, not performance, of a contract between them. That the one entity is vitally interested in the other's acts or performance cannot make the acts of one the acts or performance of the other so long as independence exists.

Section 4(c)(2) refers to the "activities" of contractors with specific relation to the performance of these particular contracts. The Commission's "activities" are listed generally as the execution of contracts, the requiring of frequent reports by the contractor of "his activities," frequent inspection of the "contractor's activities," and permitting "partial and advance payments." Section 9(b) does not mention activities of the contractor even though the only specific provision of the Act relating to these contracts does.

A sale is a contract. Taxwise it conceives completeness with execution. It necessarily involves two entities and the acts of each are parallel or intertwined. The "sales" tax, as its name denotes, is upon

the contract of sale. It falls upon the execution of the contract and thus upon the acts of both parties to the sale. When one party is the Government the tax is void.[23]

The performance (as distinct from the execution of the contract) by one party is *solely* the act or activity of the one independently performing. It cannot be otherwise if independence exists. Thus a tax even directly upon the performance or "activity" of one entity cannot be upon the acts of the other. The Washington tax is neither upon contracts nor performance but is yet a further step away from the Government. It is upon a private corporate person, measured by a percentage of his gross income. This tax is no different than one on the net income except in the amount passed on, both hidden, in the total charge for performance.

Section 9(b) was derived from the May-Johnson Bill on Atomic Energy. This bill stated that only the property and income of the Commission and corporations created by it were to be exempt. Contractors such as General Electric were contemplated but

[23] *Panhandle Oil v. Knox*, 277 U. S. 218 (1928) sales tax on sales to federal government invalid; *Indian Motorcycle Co. v. United States*, 283 U. S. 570 (1931) sales tax on sale to state invalid; and *Alabama v. King & Boozer, supra*, sales tax on sale to (*not by*) federal contractor, valid. The Washington sales tax act was amended in 1941 from the Alabama (*King & Boozer*) formula to the Tennessee (*Carson v. Roane-Anderson*) formula.

no effort was made to immunize them. This was the effect of every bill submitted on atomic energy including the successor McMahon Bill, which became law. It was directly in line with the existing and well known policy of the Congress and the Executive that contractors with the Government pay state taxes.

In the long and extended hearings on the May-Johnson and the McMahon bills, all assumed that the tax features conformed to existing policy. Private enterprise was to be encouraged. In the entire comprehensive hearings on these bills, we find no mention of any change in the taxable status of private enterprise. Surely if Congress and the Executive intended to completely reverse established policy, we could find at least *some* discussion of this intent.

The final draft of the McMahon Bill removed the power to create corporations and section 9(b) was modified to accommodate that change. The draftsman used the TVA Act as a form and inserted the word "activities"—the TVA Act which sets up a government corporation used the term "franchises." The draftsman felt, with reason, that the "activities" of a non-corporate entity was the same as "franchises" of a corporation.

The Bill was reported out and passed with absolutely no mention of any even minor alteration of the tax status. Could such a dramatic change from

not only one but all previous bills on Atomic Energy as well as from the known and established Congressional and Executive policy slip by unnoticed and unintentional?

Did Congress contemplate a change which would completely upset employer-employee relations by denying workers of hard earned state social benefits—disability compensation, unemployment compensation, medical aids, etc.—all directly supported by state taxes measured by payrolls?[23] These most closely of all taxes are upon and directly measured by "activities," i. e., performance of a contractor. If appellants are correct, the broad scope of section 9(b) more completely and conclusively prohibits payroll taxes, than the tax here involved. Can appellants argue that this was the Congressional intent? Such a conclusion is absolutely necessary to hold that section 9(b) exempts General Electric here. The intent of Congress is completely demonstrated by its amendment of section 9(b).

1. Test Is Legal Incidence:

Since sovereignty itself, as well as constitutional doctrines of dual sovereignty and inter-governmental tax powers and immunities is a "legal" concept, it should prove no surprise that the constitutional

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[23] See *Buckstaff Co. v. McKinley*, 308 U. S. 358 (1939) involving Arkansas Unemployment Compensation Taxes.

validity of the tax of either sovereign as it affects the other is and must be tested by its legal incidence. This is and necessarily must be admitted.

A "discriminatory" tax affecting either sovereign, even though the legal incidence of it is upon a private person, would be invalid—*not* because of its aim and its economic effect upon the other sovereign but because it was discriminatory. Dual sovereign concepts would not be involved. This may be shown by the inverse—if nondiscriminatory, the tax would be constitutionally valid. There is no suggestion thus far that our tax is, in the slightest degree, discriminatory.

2. Federal Power to "Protect":

The phrase "Congress has the right to protect its instrumentalities," presumably from state taxation, misleads. "Protect" connotes prevention of *discriminatory* taxation or prevention of interference with federal functions. There is no claim of "interference" here. If a tax is not discriminatory, and its legal obligation is upon a private individual, independent of any governmental agency, the term "protect" is inapplicable. There is nothing to "protect from" unless it is from the economic burden of a series of state (and federal) taxes imposed upon each link in the economic chain and passed on as measurably increased costs. There can be no "pro-

tection" from our form of government or from our Constitution.

3. Legislative Repeal of Constitutional Rights:

If in truth, the right of either sovereign to tax a given legal situation is constitutional, the legislature of neither sovereign may repeal that right. Conversely, if the legislature of either sovereign may repeal a right, it cannot be constitutional. If a "constitutional right" means anything, it means protection from legislative encroachment. Why else a Constitution?

On the other hand, if the right of a state to tax the *Silas Mason*, *King & Boozer*, and *Dravo*[24] contractors was based upon "consent" of Congress, the right may, of course, be withdrawn. This would require a completely new and heretofore denied doctrine—that the silence of Congress waives immunity. No legislative consent is necessary to the exercise of a true constitutional right. A legislature may revoke only that which it may give.

States are but geographical groups of individuals. The constitutional rights of the "States" are in actuality the constitutional rights of the sum

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[24] *Silas Mason v. Tax Commission*, 302 U. S. 186 (1937); *Alabama v. King & Boozer*, 314 U. S. 1 (1941); and *James v. Dravo Contracting Co.*, 302 U. S. 134 (1937). These cases did not declare "new law" but logically and directly followed a clear, pre-existing path.

of the individuals comprising that state. The rights of the many can be no less sacred than the rights of the individual. Indeed, the individual shares an allocable portion of the rights guaranteed to the sum. No one could be heard to argue that either Congress or a state legislature could revoke constitutional rights of individuals.

If in Congress resides the power to deprive a state of Constitutional rights, can individual rights be far behind? The first encroachment should be as strongly resisted as the last. We have all witnessed the so-called constitutional governments where the constitution existed at the whim of the legislature. This means at the whim of the majority group and often of the man in practical control. The obvious next step is exemplified many times in both past and contemporary history.

ARGUMENT—PART I

I. Importance of the Question

Appellants state that even though the offending sentence of section 9(b) is dead (Public Law 262, 1st Sess., 83d Cong.) that this case is important because a total of $5,622,310 is involved in several states. (App. Juris. St. 14.) We too believe the question important—much more than the general business taxes involved.

Appellants contend that Congress declared an exemption from *all* state taxes, permitting payment only in lieu of *property* taxes. The AEC is given no authority to disregard Congressional declaration, and therefore the following types of state taxes for this period are also in question:

1. Unemployment Compensation Taxes;
2. Workmen's Compensation Taxes;[35]
3. Social Security taxes;
4. Net Income taxes;
5. Corporate license fees;
6. Excess Profit taxes;
7. Capital stock taxes;
8. Property taxes on the property of the contractor used in performance of the contract;
9. Sales and Use taxes upon purchases and uses of property where title and possession remain in the contractor;

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[35] It may be of interest, although perhaps immaterial, to note that the Washington State Department of Labor and Industries is presently in dispute with General Electric and AEC over who should pay certain pension increases to injured General Electric workmen authorized by Rem. Rev. Stat. § 7679(b), (1947 Supp.). The decision pends the outcome of this case. The AEC position under section 9(b) is that it is willing that its contractors pay these taxes. Bull. GM-LEG-9, Serial No. 253, p. 2; see U. S. Code, Cong. and Adm. News, No. 17, September 20, 1953, pp. 4056-4057. For other pertinent expressions on this problem, see Hearings, Joint Committee on Atomic Energy, part 11, June 20, 1949, p. 494, 81st Cong., 1st Sess. and Hearings, Joint Commitee on Atomic Energy, "State Taxation of AEC Contractors," April 24, 1952, pp. 41-42, 82nd Cong., 2d Sess. (See also R. 88-89.)

10. Gasoline, as well as Highway Use taxes.[26]

Appellants cannot argue the broad scope of section 9(b) without including the above taxes. It would seem meritless for appellants to contend that they have not yet "claimed" exemption from those taxes in a case involving the interpretation of law, section 9(b), and of Constitution.

II. Description of the Washington Tax

The Washington business tax is upon "persons" and measured by gross income. Section 4 of the Washington Revenue Act of 1935 as amended (Rem. Rev. Stat. § 8370-4, 1943 Supp.), provides:

> "From and after the first day of May, 1935, there is hereby levied and there shall be collected from every person a tax for the act or privilege of engaging in business activities. Such tax shall be measured by the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be, as follows:
>
> * * * * * * * *
>
> "(b) *Upon every person* engaging within this state in business as a manufacturer; as to

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[26] The above AEC bulletin mentions nothing about highway use taxes. It appears, from the general language, to be claimed as exempt. Since motor vehicle licensing in most states is intended for revenue (road construction, etc.) as well as police or regulatory purposes, presumably appellants will claim exemption in this field as well. Their previous arguments has permitted no limitation on the scope of the exemptions.

such persons the amount of the tax with respect to such business shall be equal to the value of the products manufactured, multiplied by the rate of one-quarter of one per cent; * * *.

"(c) *Upon every person* engaging within this state in the business of making sales at retail; as to such persons, the amount of tax with respect to such business shall be equal to the gross proceeds of sales of the business multiplied by the rate of one-quarter of one per cent;" (Emphasis Supplied.)

Other business classifications generally follow the same pattern and rate. However, the "service" or "all other business" section sets the rate at one-half of one per cent, see Rem. Rev. Stat. § 8370-4(g) (1943 Supp.).

Section 6, Rem. Rev. Stat. § 8370-6 (1943 Supp.), provided that persons engaging in more than one taxable classification were subject to each tax. However, it then provided that one category only would be taxed relative to each product handled. The design and result is that a tax at uniform rates against gross income is imposed equitably on persons doing business in Washington. It is the measure of benefits received against ability to pay.

Section 14, Rem. Rev. Stat. § 8370-14 (P. Supp.), in unchanged existence for almost two decades, is extremely material in this action; it provides:

> "It is not the intention of this title that the taxes herein levied upon persons engaging in business shall be construed as taxes upon the purchasers or customers, but it is the intention that such taxes shall be levied upon, and collectible from the person engaging in the business activities herein designated and that such taxes shall constitute a part of the operating overhead of such persons engaging in business."

This court in *Gwin, White & Prince v. Henneford*, 305 U. S. 434 at 454 (1939), refers to this tax as

> "an occupation tax for the act or privilege of engaging in business."

and further

> "the tax is measured by a percentage of the gross income solely of that business."

In general, therefore, the tax is one imposed upon persons, measured by the application of a uniform rate against gross income. See *Mason Co. v. Washington State Tax Commission*, 302 U. S. 186 (1937).

This tax is self-assessed, and according to the certified returns of General Electric Company, they measured it at one-quarter of one per cent of the gross income from its retail sales made not only to the federal government but to others as well.

No retail sales tax was paid. The incidence of our sales tax, as in Tennessee, is upon the ultimate vendee, Rem. Rev. Stat. § 8370-21 (1941 Supp.). General Electric was purchasing for *resale* to the

government. Our sales tax would fall on the second sale,[27] the one to the government and (see R. 234-238) would therefore be invalid, *Indian Motorcycle Co. v. United States*, 283 U. S. 570 (1931). The use tax is also, as in Tennessee, upon the purchaser, the Government, and it too would be invalid.

Sales to an "agent" are sales to the principal. If the principal is the Government, the sales (or use) tax cannot apply.

In the first situation, where an independent contractor purchases at wholesale and sells at retail to the Government (as admittedly did General Electric), the sales and use tax would not and gross income tax would apply.

Where the purchases are made as an "agent" of the Government, the agent is only a conduit of the payments to the suppliers. He neither has title to the funds nor the purchases. Ownership or title passes directly between the Government and the supplier. The gross income tax applicable to the agent would then only be the compensation for his agency.

The Washington position, since 1941, has been that sales and use taxes do not apply to such purchases by contractors with the Government. This is the holding of *Carson v. Roane-Anderson*. The *Ala-*

[27] The first sale was by the supplier to General Electric.

bama v. King & Boozer situation is identical to the Washington law prior to 1941. There the contractor was the "consumer" and the sale *to* him was taxed, not the subsequent sale *by* him.

Washington statute specifically excludes exempt sales under the business, sales and use tax chapters.[28]

III. Tennessee Taxes in Carson Case

As the appellants submit this case in sole reliance upon this Court's decision regarding certain Tennessee taxes, *Carson v. Roane-Anderson*, 342 U. S. 232 (1952) the legal incidence of those taxes must be thoroughly examined. We first note that (1) the Tennessee taxes were *upon* transactions or contracts; and (2) that the actual and intended legal incidence of those taxes is vastly different than the Washington gross income tax involved here.

Two Tennessee taxes, the retail sales and use tax, were involved. Both are imposed by chapter 3, Tenn. Laws of 1947 (section 1328.1 to 1328.18) en-

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[28] Rem. Rev. Stat., § 8370-19 (1945 Supp.) the sales tax exemption, provides:

> "The tax hereby levied shall not apply to the following sales:
>
> * * * * * * * * *
>
> "(d) Sales which the State of Washington is prohibited from taxing under the constitution of this State or the Constitution and laws of the United States;"

Similar provisions are contained in the business and use tax chapters.

titled the "Retailer's Sales Tax Act." The Tennessee legislature states, Will., Tenn. Code, 1328.25 part, (1951 Supp.):

> "It is the intention * * * of this Act to levy a tax on *the sale at retail*, the use, * * * in this state of tangible personal property." (Emphasis supplied.)

As to the use tax, section 1328.25 part, (1951 Supp.) states:

> [*Property Received from out of State*] "On all tangible personal property imported, or caused to be imported from other states or foreign country, and used by him the 'dealer' as thus defined [sec. 1328.4] shall pay the tax imposed by this Act on all articles of tangible personal property so imported and used, *the same as if said articles had been sold at retail*, for use or consumption in this State. For the purposes of this Act, *the use, or consumption, or distribution, or storage* to be used or consumed in this State of tangible personal property *shall each be equivalent to a sale at retail, and the tax shall immediately levy and be collected in the manner provided herein*, provided there shall be no duplication of the tax in any event." (Emphasis supplied.)

Where does the actual incidence of the Tennessee sales tax fall? Section 1328.26 (1951 Supp.) provides:

> "(a) The privilege tax herein levied, measured by retail sales *shall be collected by the dealer from the purchaser or consumer.*

"(b) Dealers shall, as far as practicable, add the amounts of the tax imposed under this Act to the sales price *or charge, which shall be a debt from the purchaser or consumer to the dealer, until paid, and shall be recoverable at law in the same manner as other debts.* Any dealer who shall neglect, fail, or refuse to collect the tax herein provided, upon any, every, and all retail sales made by him or his agents, or employees, or [of] tangible personal property which is subject to the tax imposed by this Act, shall be liable for and pay the tax himself." (Emphasis supplied.)

The dealer does not become liable *unless* he fails to pass on the tax himself. To insure that the tax is passed on, Tennessee statute, section 1328.26(d) (1951 Supp.) provides:

"(d) Any dealer who shall fail, neglect, or refuse to collect the tax herein provided, either by himself or through his agents or employees, shall, in addition to the penalty of being liable for paying the tax himself, be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not more than One Hundred ($100.00) Dollars or imprisonment in the County Jail for not more than three months, or both, in the discretion of the Court."

And to make doubly sure, section 1328.26(e) provides:

"(e) A person engaged in any business taxable under this Act shall not advertise or hold out to the public, in any manner, directly

or indirectly, that he will absorb all or any part of the tax, or that he will relieve the purchaser of the payment of all or any part of the tax. A person who violates this provision with respect to advertising shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than Twenty-five ($25.00) Dollars, nor more than Two Hundred Fifty ($250.00) Dollars, or imprisonment in the County Jail for not exceeding three months, or both, in the discretion of the Court. For a second or subsequent offense the penalty shall be double."

The contractors in the *Carson* case could purchase the property in one of two ways: (1) as agent for the Government[29] or (2) as an independent contractor and thus for resale to the Government. In *either* case, the tax was and should have been held invalid. Again, *this was the identical position of Washington State relative to its own sales and use taxes as long ago as 1941* (R. 150, 250, 262.). See *Morrow v. Henneford*, 182 Wash. 625 at 633. 47 P. (2d) 1016 (1935).

As agent, the sale was to the Government and the tax was invalid; as independent contractor, the sale was to the Government, with the contractor,

[29] One *Carson* case contract expressly provided that the company was "agent" of the United States (R. 75-76, No. 186, 1951 Term.). The purchase orders also disclosed that the purchase was made as agent for the government (R. 76, 82).

under criminal penalties, required to collect the tax from the Government and remit it to the state.

The "pass on to the consumer" requirement of the Tennessee statutes also applies, "as far as practicable" to the use tax. The possible argument that a use tax cannot be passed on is conclusively answered by the situation in *Carbide & Carbon Chemical Corp. v. Carson*, 192 Tenn. 150, 239 S. W.(2d) 27 (1951) which provides a perfect example of how this tax not only can, but must, as a separate charge, be passed on to the Government. The use tax is imposed upon the ultimate consumer—in Tennessee and Washington, the Government.

Note how unlike this is from the Washington gross income tax here involved. The legal incidence of both Tennessee taxes is placed clearly either upon the Government or the contract itself and, under Tennessee law, the *Government* would have been *legally required* to pay. The contractor is required to collect and remit from the Government to avoid both civil and criminal penalties.

As the legal incidence of the Tennessee taxes was directly upon the Government, the *Carson v. Roane-Anderson* decision, so heavily relied upon by respondent is not new law. See *Federal Land Bank v. Bismarck Lumber Co.*, 314 U. S. 95 (1941); and *Indian Motorcycle Co. v. United States*, 283 U. S. 570

(1931). Such we feel is the reason that the question merited only short shrift, contrary to the extended analyses and discussion in *James v. Dravo Contracting Co., supra*; *Alabama v. King & Boozer, supra*; and *Silas Mason Co. v. Tax Commission*, 302 U. S. 186 (1937).

IV. Tennessee Judicial Interpretations

We expect appellants to argue as they did below that the Tennessee tax is a "privilege" tax, citing *Hooten v. Carson et al.*, 186 Tenn. 282, 209 S. W. (2d) 273 (1948) and it is therefore identical in legal incidence for constitutional purposes, as the Washington tax involved here.

Examination of the cited case discloses, like *Morrow v. Henneford*, 182 Wash. 625, 47 P.(2d) 1016 (1935), the action was brought to contest the validity of the newly enacted sales tax law. The Tennessee court properly ruled that the tax was not invalid as one on property but was an excise or privilege tax instead, imposed

> "upon retail sales" 186 Tenn. 286 [in other words, a transactions tax].

It is true the court later characterizes the tax as upon the "privilege" of selling but the specific legal incidence of the tax for Federal constitutional purposes was not there involved. The following language of the court, however, is of assistance:

> "We think the mere fact the state passes the tax to the buyer as a matter of reasonable tax practice and regulation does not impair the power of the state to declare it a privilege and tax it as such." 186 Tenn. 288.

It is this very feature of the state passing the tax which invalidates. A tax may not be a "privilege" tax if imposed on someone other than the person "privileged." Since the buyer is the obligor, the tax if a privilege, is not upon the privilege of "selling" but of "buying."

Further, the majority of the same court in *Carbide & Carbon Chemical Corp. v. Carson* (Tenn.), *supra*, held that the tax was upon the transaction and the exempt "activities" of the commission, included *its* "transactions." This and the *Carson v. Roane-Anderson* decision was basically but a reaffirmance of the sound principles enunciated over a century and a quarter before, that the state may not levy a tax upon a contract of the United States. *Osborne v. Bank of United States*, 9 Wheat. 737, 867 (U. S. 1824); *Weston v. Charleston*, 2 Pet. 449, 468, 475 (U. S. 1829); *Pollock v. Farmers Loan & Trust Co.*, 157 U. S. 429, 586 (1895); and *Indian Motorcycle Co. v. United States*, 283 U. S. 570, 573, 574 (1931); and see *Willcuts v. Bunn*, 282 U. S. 216, 225 (1931).

That the Tennessee tax was laid *directly* upon the purchaser, the Government, was the specific basis

of the concurring opinion which was the decisive vote in *Carbide & Carbon Chemical Corp. v. Carson*, (Tenn.), *supra*.

The difference between the Washington gross income tax and the Tennessee sales and use taxes may be simply summarized. The legal incidence of the Washington tax is clearly and solely upon General Electric, as is the economic incidence in so far as it is legislatively possible to provide.

The concepts of measurement are entirely separate—one is by sales, the other by *all* business income to be reported in categories, *Home Insurance Co. v. New York*, 134 U. S. 594 (1890). The Washington tax is and is designed to be a "part of overhead." There is no difference to the Government between the tax on General Electric and the same tax imposed on General Electric suppliers. The legal incidence of the Tennessee taxes is upon the Government *directly* (both where agents or independent contractors are involved) and the statute would require the Government to pay. The Tennessee statute *requires* the tax to be passed on and there can be no question as to the *direct*, rather than *indirect* economic incidence.

Section 9(b) exempts "activities" (acts) of the Commission; a transaction is a contract and both are "activities." A tax directly upon the transaction must, and did, fail.

Except as to transactions, however, the acts or activities of the Commission cannot be the activities of one who is independent of the Commission. The concepts are mutually exclusive. The Washington gross income tax is imposed upon the contractor alone. The *Carson v. Roane-Anderson* decision is correct but does not control.

We should notice one more interesting item. Tennessee imposes (1) an excise tax on businesses measured by net business income, Will. Tenn. Code, § 1316 *et seq.* as amended; (2) an income tax is imposed by section 1123.1 *et seq.*; and (3) a business and occupation tax by section 1248.1 *et seq.* For the "general contracting business" the tax is graduated upon the contract price, section 1248.40 (1951 Supp.); and (4) finally an additional business tax is imposed upon corporations doing business in Tennessee, measured by the value of stock, section 1248.143 *et seq.*

These taxes were also applicable to the instate contractors in the *Roane-Anderson* case. They too must have been paid but no contest was made of such of the above taxes as were applicable. This failure, at a minimum, establishes that general business or gross income taxes were not involved in that case.

V. Congress Never Intended to Exempt Independent Contractors

1. Preface

Examination of the holdings of all the non-overruled cases since *McCulloch v. Maryland*, 4 Wheat. 316 (1819) discloses a clearly recognizable pattern of long accepted constitutional precepts. That this was an accurate judicial analysis not only constitutionally but in practical economics is shown by its adoption by both the legislative and executive branches of our Government. Congress has uniformly either stayed directly within the pattern or waived the immunity it otherwise had. No change in this pattern was made by the Atomic Energy Act.

In 1937 in *James v. Dravo Contracting Company*, 302 U. S. 134, this court declared in unmistakable language that a private person had no claim to immunity from state taxes *imposed upon him* merely because he contracted with the Federal Government. This was not new law, see for example *Alward v. Johnson*, 282 U. S. 509 (1931), and *Thomson v. Pacific Railroad*, 9 Wall. 579, 591 (U. S. 1869) but it did remove doubt. In the *Dravo* case the court requested the Solicitor General to present the views of the United States. The United States' position was that the tax is valid. It is set forth in the report of the case, 302 U. S. at 171-172, as follows:

> "We have indicated that a tax on the contractor, the sole result of which is to increase the cost to the sovereign by the amount of the normal tax burden, presents no interference with its operation."

and also that the imposition of the tax

> "is in no sense a threat to the capacity of the government to perform its functions."

The *Dravo* test, now succinctly phrased as "legal incidence," was approved by *Silas Mason v. Tax Commission*, 302 U. S. 186 (1937); *Alabama v. King & Boozer*, 314 U. S. 1 (1941), and *Curry v. United States*, 314 U. S. 14 (1941).

The decisions in the *Curry* and *King & Boozer* cases were handed down in the midst of hectic defense preparations involving expenditures theretofore undreamed of. The defense establishments then immediately pressed for legislation to exempt their contractors from state taxation. Congress refused despite the fact that state taxes on these expenditures was estimated to be 1.5 to 2 billions.

The lower estimate is greater than the *total* expenditures on atomic energy for the first three years of the Atomic Energy Act (see *infra*).

2. Executive Position

The constitutional boundaries of tax power and immunity set by the Court was approved by the

Executive through the Treasury Department and the Bureau of the Budget. These executive divisions are most closely concerned with maintaining stable Federal-state and local fiscal relationships. This was a particularly trying period. The demands on the Federal Government were constantly growing.

The acting Secretary of the Treasury, Mr. John L. Sullivan, wrote to R. L. Doughton, Chairman of the House Ways and Means Committee, on February 16, 1942 relative to the Doughton Bill to exempt defense contractors from sales and use taxes as follows:

> "Further reference is made to * * * H. R. 6049 (77th Cong., 1st Sess.) entitled 'A bill to exempt from State and local taxes the sale, purchase, storage, use, or consumption of tangible personal property for use in performing defense contracts.'
>
> * * * * * * * * *
>
> "The proposed Bill expanding the existing exemption as to State sales and use taxes is believed to be undesirable for the reasons set forth below, and this department therefore objects to its passage.
>
> "So long as the taxation of defense activities is nondiscriminatory and so long as the legal incidence of the State tax falls upon private persons, this Department believes that this type of tax will not impede the National Government in carrying on its operations, nor restrict its

choice of the means by which it discharges its functions."[30]

The Director of the Budget, Harold D. Smith, wrote to the Chairman of the House Rules Committee on April 10, 1942, relative to H. R. 6750, which also sought an exemptive status for war contractors.

> "I have given extended consideration to this bill. Its effects are not easily appraised, and conditions have changed materially since this kind of legislation was first proposed. Nevertheless, I think the bill should not be passed. In my opinion, direct savings which its enactment would make for the Treasury, though substantial, would not be so great as some rough estimates have implied; in any case they would be offset by losses to State and local governments and a serious impairment of Federal-State-local relations. * * *
>
> "The Congress and the President have made extended efforts to achieve a measure of harmony in the fiscal policies of the Federal, State, and local governments. To this end, the Congress had made successive large grants of aid to State and local government. The President pointed out in his Budget Message last January that the State and local governments are adapting their wartime fiscal policies and readjusting many of their services to support the war effort. It will be difficult indeed to re-

[30] The full text of this and the letter of Mr. Smith, Director of the Budget, is set forth in full in Hearings, Joint Committee on Atomic Energy, April 24, 1952, pp. 23-27.

tain this cooperative attitude if we take measures that cancel the substantial part of State and local revenues.

"In September, 1941, when a bill was proposed to accomplish the exemption of defense contractors from State and local taxes (S. 1739), we advised the interested departments that enactment of *this legislation would not be in accord with the program of the President.* The right of the states to tax transactions with defense contractors was on its way to the Supreme Court. The decision rendered November 10, 1941, affirmed the right of the states under certain circumstances to tax transactions with defense contractors. The court pointed out that the Congress had declined to pass immunizing legislation. H. R. 6049, introduced a week later was designed to extend the immunity. Its substance has been incorporated, with additions, in H. R. 6750. * * *

"Obviously, we cannot exempt from State and local taxes all the property and all the transactions of a business enterprise simply because a substantial part of its business is being done with the Federal Government. * * * There would be no basis in law or in justice for doing so. * * *

"I do not see how the Federal Government can afford to adopt under any circumstances a policy that tends to disorganize state and local governments.

* * * * * * * * * *

"As you probably know, the Treasury Department has expressed opposition to H. R. 6750

> and earlier bills on the same subject. The Treasury is much concerned about the effect of finances on state governments already imperiled * * *. Like the Bureau of the Budget, the Treasury is also deeply concerned with the effects that this legislation may have upon the general problem of Federal-State fiscal relations."

Mr. Smith had strong feelings in 1942 that the exemption should remain on a constitutional basis. He was the first witness to testify on S. 1717[31] and he went into great detail, strongly criticizing a portion of the bill which was against existing Congressional policy—that of not permitting the creation of federal corporations. If the draftsmen of either S. 1717 or the predecessor May-Johnson Bill had intended to grant the tax immunity to private contractors that he and the Treasury Department had so vigorously opposed a few short years before, it is reasonable to expect that at the very least he would have mentioned that feature. Note that the Bureau of the Budget and Executive Department is *still* opposed to such immunity as is claimed here.[32]

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[31] Hearings, Special Senate Committee on Atomic Energy, part 1, January 22 and 23, 1946, pp. 31-46.

[32] See letter of Rowland Hughes, Assistant Director of the Budget, to the Chairman of the Joint Committee on Atomic Energy, July 23, 1953, Senate Report No. 694, No. 17, U. S. Code, Cong. and Adm. News, 83d Cong., 1st Sess., September 20, 1953 at pp. 4058-4060.

3. Established Position of Congress

Congressional policy coincided with that of the Executive. The above legislative proposals as well as others designed to grant immunity to defense contractors was refused although vigorously advocated by the War and Navy Departments. Previously, on two earlier occasions, Congress had denied the Navy Department's requests for legislation exempting their cost-type contractors from state taxes.[25]

The most significant occasion of this kind was the refusal of the House to pass the Doughton bill, H. R. 6750, 77th Cong., 2d Sess., and its two predecessors introduced by Representative Cochran of Missouri, H. R. 6049, 77th Cong., 1st Sess. and H. R. 6617, 77th Cong., 2d Sess. None of these bills went

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[25] See H. R. 8438, 76th Cong., 3d Sess., Senate Amendment 120, S. Rpt. No. 1654, with extended debate thereon. 86 Cong. Rec. part 7, pp. 7518, 7527-7539 and 7648; and Hearings, Senate Sub-Committee on Appropriations, Navy Department Bill for 1941 (H. R. 8438), pp. 16 and 17; Supplemental Hearings, pp. 20, 21. See also Legis. Hist., Act of June 15, 1940, 54 Stat. 400, authorizing construction of Naval aircraft and works. Naval officers appearing before the Senate Naval Affairs Committee requested the bill be amended to constitute cost-plus-fixed-fee contractors to be agents of the United States so as to avoid state sales taxes. Hearings on Senate Naval Affairs Committee on S. 4024 (later substituted by H. R. 9848) 76th Cong., 3d Sess., pp. 47-48. The Committee proposed the amendment, S. Rpt. No. 1716, 76th Cong., 3d Sess., but it was eliminated in conference, 86 Cong. Rec. p. 7827 and passed p. 7956.

as far as the Senate.[84] Note that all of these bills were limited only to state sales and use taxes. Immunization from gross income and business taxes was not even contemplated.

Prior to that time, Congress had refused to approve tax exemption for defense contractors as proposed in various armed forces appropriation bills. Instances of this refusal are found in the proceedings on Public Law No. 588, 75th Cong., 3d Sess., introduced as H. R. 9848. Statements concerning the exemption proposed in Public Law No. 588 appear in 86 Cong. Rec. 11401, 11402 and 11404. Various references to the Doughton bill and its predecessors are found in Volume 88 of the Congressional Record.

This total governmental policy is further demonstrated by the elimination of the tax exempt status of judicial salaries; of governmental salaries; generally of the proceeds of leases of federal property or the property of federal wards, or the proceeds of leases of state property or income from state governmental contracts, and exemption from taxation of transactions taking place on or income derived from activities in areas over which the Federal Government had exclusive jurisdiction, see the Buck Act, 4 U. S. C. A.

[84] The history of the attempt to immunize defense contractors is fully reviewed in Pierce, "Should War Contractors and their Vendors be Immune from State Taxes?" 27 Bull. of the Nat. Tax Assoc., 244 (May 1942).

(Supp.), sections 105-110. This policy prevailed during the defense and rearming period. It still prevails.

It can hardly be contended that Congress was fearful of a tax drain on AEC appropriations when it denied *all* efforts to exempt defense contractors. In 1942, the estimated costs of military activities due to state and local taxes alone was from 1.5 to 2 billions.[25] This amount exceeds the total annual AEC *expenditures* for each year up to 1951 and the total of the first three years appropriations after enactment of the Atomic Energy Act.

The military services expenditures for the fiscal year 1943, when Congress refused the Cochran and Doughton bills and other amendments to exempt defense contractors from state and local taxes, were 62 billion dollars. In 1944 and 1945 military expenditures were 75 billion and 80 billion dollars, respectively. In contrast, the total expenditures of the AEC during its first year of operation was but 174 millions. The expenditures of the Atomic Energy Commission in the immediate post-war years when estimates were first shown separately are set out in in the footnotes.[26]

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[25] See page 3 of the letter of Harold D. Smith, Hearings, *supra*.

For section 9(b) to be construed as appellants contend, both Congress and the Executive would have to completely and dramatically reverse themselves in order to save pennies where they had specifically refused to save dollars, and to completely reverse the policy set in the Lanham Act,[37] designed to *assist* state and local governments.

4. Federal Use of Private Contractors

Arguments in the *Roane-Anderson* case made much of the fact that the Atomic Energy Commission was authorized to use private contractors to carry out its operations. It was also inferred that the authority to use contractors makes the Atomic Energy Commission somewhat unique and this was reflected in the tax provisions of the bill when passed.

Many, if not most Federal agencies may perform their functions either directly through their own organization and employees, or through contractors. The armed services, for example, utilize contractors on a financial scale much larger than the AEC. When

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[36] AEC expenditures are as follows:

1947	$174 million	1950	$550 million
1948	475 million	1951	897 million
1949	622 million	1952	1.7 billion
	1953 2.7 billion (estimated)		

For fiscal year 1954 the AEC budget estimate is 2 billion. (Figures obtained from the National Association of Tax Administrators.)

[37] Public Law 137, 77th Cong., 1st Sess., c. 260, 42 U. S. C. A. §§ 1401-1593(e).

such agencies perform the operations themselves, they are exempt. When they utilize private contractors, those contractors are taxable.

5. Use of Contractors Involve Definite Consequences

The decision to use an independent contractor automatically results in numerous legal consequences that would not exist if the Federal agency decided to do the job itself. The use of an independent contractor may place the Government in an advantageous position in many ways and less satisfactory in others.

The tax status is but one instance of the change of relationship following from the use of contractors. The status of employees, methods of choosing employees, civil service, retirement, social security, workmen's compensations, liability to third parties, etc., all differ depending upon whether Federal or contract operation is chosen.

The AEC was assignee of the Hanford contract —an immense, existing private contract operation, admittedly taxable, which was begun only four months previous to the effective date of the Act. Could Congress have intended a complete alteration of that relationship relative not only to state tax duties and benefits but of the employer-employee relationship as it pertained to payroll taxes and state benefits to the workmen?

The Atomic Energy Act itself declares as a policy:

> "Accordingly, it is declared to be the policy of the people of the United States * * * the development and utilization of atomic energy shall, so far as practicable, be directed toward * * * *strengthening free competition and private enterprise*" 42 U. S. C. A. § 1801.

"Free competition and private enterprise" will not be strengthened by the granting of discriminatory tax benefits to certain members of private enterprise under the broad concept of immunity for which appellants contend.

6. The History of Section 9(b)

A. Preface

A careful examination of the history of the Atomic Energy legislation with reference to the tax exemption section yields not the slightest indication by way of comment, explanation, inference or otherwise, that Congress intended any change in its existing policy.

> "Therefore, when the War Department entered into the contracts in question, it was with the full knowledge that Congress had refused to make such contractors agents or instrumentalities of Government and that Congress had likewise refused to make available to such contractors a specific statutory exemption from

State and local taxes." *Standard Oil Co. v. Fontenot*, 198 La. 644, 4 So. (2d) 634, 642-643 (1941).

B. Detailed History

In May, 1945, Secretary of War Stimson with the approval of the President appointed an Interim Committee[38] to recommend legislation to insure that the development of atomic energy would be in the best interests of the country. The actual drafting was done by Brig. Gen. Kenneth C. Royall and William L. Marbury.

The policy of the bill relating to private enterprise is well stated in the October 3, 1945, message of the President of the United States to Congress:

> "We believe that our science and industry owe their extent to the spirit of free inquiry and the spirit of free enterprise that characterize our country. The Commission, therefore, in carrying out its functions should interfere as little as possible with private research and private enterprise, and should use as much as possible existing institutions and agencies."[39]

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[38] The Committee was composed of Dr. Vannevar Bush; Dr. James B. Connant; Gen. Leslie Groves; Karl Compton; Henry L. Stimson, Secretary of War; Ralph A. Bard, Secretary of the Navy; William L. Clayton, Asst. Secretary of State; James F. Byrnes, representing the President; and George L. Harrison, special assistant to the Secretary of War.

[39] Hearings, House Committee on Military Affairs, H. R. 4280, October 9 and 18, 1945, p. 2; and see Hearings, Special Senate Committee on Atomic Energy, S. 1717, part 4, February 18, 19 and 27, 1946, p. 496.

When the Interim Committee had reached agreement on the scope and language of the proposed legislation it was submitted to certain governmental agencies.[40] This Bill, known as the May-Johnson Bill, was introduced in the House (H. R. 4280, 79th Cong., 1st Sess.) by Representative May of Kentucky, and in the Senate (S. 1463, 79th Cong., 1st Sess.) by Senator Johnson of Colorado on October 13, 1945. Extensive hearings began.

The May-Johnson Bill (section 10) authorized the use of independent contractors but it *did not* exempt them from tax. Section 16 *only* exempted.

> "The Commission and any corporation created by it, and the property and income of the Commission or of such corporations."

This is directly in line with the uniform and over-all established policy. Section 20 of the May-Johnson bill entitled "Definitions" defined many terms. Subsection "(g)" includes contractors under the general term "agent of the Commission."

It is this feature that led the Government to erroneously state to the Court in the *Carson* case[41]

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[40] This and the following brief recital is derived from the testimony of the Secretary of War, Robert P. Patterson, Hearings, H. R. 4280, 79th Cong., 1st Sess., p. 4 *et seq.*; and Miller, A Law Is Passed—The Atomic Energy Act of 1946, 15 Univ. of Chicago Law Rev. 803 (1948).

[41] Gov. Br. 46, Nos. 186, 187, (1951 Term).

that the May-Johnson Bill[41] exempted independent contractors. This, despite the obvious fact that contractors were *not exempted* by the specific tax exemption clause.[42] If the May-Johnson Bill intended to exempt contractors, the House Committee's report on H. R. 4566 would have stated more than merely:

> "The property and income of the Commission and its corporations are exempt from State and local taxation."[43]

as it did, with not a word about exempting contractors.

Section 16 of these bills was the prototype of section 9(b) of the Atomic Energy Act of 1946. Section 16 (later section 15), set out in full in the notes,[44] had three basic functions.

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[41] The revised May-Johnson bill (H. R. 4566) contained the same provisions although renumbered. The tax clause, section 16, became section 15, and section 20 became section 19.

[42] Note the subsection (a) of section 20 defined agents of the Government. The definition did *not* include contractors.

[43] H. Rpt. No. 86 to accompany H. R. 4566, 79th Cong., 1st Sess., p. 14.

[44] Section 16 of H. R. 4280, S. 1463 and as revised in H. R. 4566, reads in full:

> "Sec. 16. In order to render financial assistance to States and local governments in which the activities of the Commission are carried on and in which the Commission, or its agents, have acquired properties previously subject to State and local taxation, the Commission is authorized to make payments to States and local governments in lieu of such taxes.

(a) It authorized the Commission to make payments in lieu of taxes on acquired properties;

(b) It authorized the Commission to make payments to State and local governments without regard for tax equivalents wherever special burdens had been placed upon State or local governments by reason of activities of the Commission or its agents;[46] and

(c) It provided that the Commission and any corporation created by it, and the property and income of the Commission of such wholly

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Such payments may be in the amounts, at the times, and upon the terms the Commission deems appropriate, but the Commission shall be guided by the policy of not exceeding the taxes which would have been payable for such property in the condition in which it was acquired, except where special burdens have been cast upon the State or local government by activities of the Commission, the Administrator, the Manhattan Engineering District, or their agents, and in such cases, any benefits accruing to the States and local governments by reason of these activities shall be considered in the determination of such payments. The Commission and any corporation created by it, and the property and income of the Commission or of such corporations are hereby expressly exempted from taxation in any manner or form by any State, county, municipality, or any subdivision thereof."

[46] Parenthetically it might be noted that the State Treasurer of Washington informs us that as of December 3, 1953, he had received absolutely no money from the Atomic Energy Commission either in payment in lieu of taxes or by reason of this provision.

owned corporations would be exempt from State and local taxation.

The statutory precedents of this section both as to substance and form are easily traced. The device of payments in lieu of taxes where large scale acquisitions of property occurs is one of general policy. It is primarily found in section 13 of the Tennessee Valley Authority Act, 16 U. S. C. A. § 831-1. The policy of defraying part of the cost of public facilities where the operations of the United States have cast special burdens upon existing facilities is found in the Lanham Act.[47]

The exemption provision in the last sentence of section 16 is consistent with the general policy previously explained in connection with other governmental departments and corporations. A good portion of the May-Johnson Bill is identical to the

[47] The Lanham Act as amended, 42 U. S. C. A., section 1521 *et seq.*, is the World War II authorization for federal expenditures to provide housing and community facilities including schools, waterworks, sewage disposal facilities, hospitals, streets, etc., in areas where existing facilities were unequal to the influx of war workers. The original Lanham Act, Public Law No. 849, 76th Cong., 3d Sess., 54 Stat. 1125, deals with housing and community facilities. The amendment of June 29, 1941, Public Law No. 137, 77th Cong., 1st Sess., 55 Stat. 361, authorized expenditures for defense public works.

A further example of this policy is the federal payments to schools whose operating expenses are affected by federal ownership of property, see 20 U. S. C. A. § 236 *et seq.*, Public Law 874, 81st Cong.

T. V. A. Act. Particularly compare the first sentence of section 13 of the T. V. A. Act, 16 U. S. C. A. § 831-1 with the first sentence of section 9(b).

The last sentence of section 16 of the May-Johnson Bill (section 15 revised) is the prototype of the present section 9(b) of the Atomic Energy Act. It provided:

> "The Commission and any corporation created by it, and the property and income of the Commission or of such corporations, are hereby expressly exempted from taxation in any manner or form by any State, county, municipality, or any subdivision thereof."

This, according to the best constitutional opinion, is the description of the tax status applicable to a Governmental instrumentality or department under the doctrine of implied immunity.[48]

Clearly, there is no tax immunity granted independent contractors. This is in full accord with the official policy expressed by the Treasury Department, the Director of the Budget, and the Executive, when the relationship of independent contractors and the United States Government, for purposes of tax immunity, was thoroughly analyzed in 1942 and previously. In other words, the drafters of the May-

[48] This description was relied upon by the Executive, see p. 1 of the letter to Congress by Mr. Sullivan, Acting Secretary of the Treasury, and p. 4 of the letter of Harold D. Smith, Director of the Budget, cited *supra*.

Johnson Bill painstakingly followed the policy prevailing prior to and throughout the World War II period and existing at that time. A distinct line of demarcation was drawn between taxes imposed on Government and those imposed on independent contractors.

If doubt existed that the plain language of the last sentence of section 16 recognized this distinction, there is further provision in the May-Johnson Bill which expressly recognized it. Section 20(g) defined the term "agent" of the Commission to include:

(1) Corporations created by the Commission;

(2) Contractors with the Commission; and

(3) Other agents.

Note that of the two main classes of "agents" defined, only the first class, that is, corporations created by the Commission, enjoy the tax exemption provided in section 16. Whereas, while contractors with the Commission might otherwise be styled as "agents" they are not included within the tax-exempt class.

Hearings on the May-Johnson Bill occurred before the House Committee on Military Affairs on October 9 and 18. The principal discussion related to desired policies in developing atomic energy, the

type of Commission, the conditions of development and the place of the military in this process. State taxes were never mentioned. One would expect state taxes to be mentioned only if a change in established policy were contemplated.

In the course of the executive sessions following hearings on H.R. 4280, some amendments were accepted and a new bill, H.R. 4566 (79th Cong., 1st Sess.) was introduced by Mr. May. This draft too authorized use of contractors. The tax exemption section was re-numbered as section 15 and section 20 became section 19.

In the House Report[49] summarizing and explaining the bill as revised, the following is the only reference to the tax exemption section:

> *"Sec. 15 voluntary payments to state and localities.*
>
> "The Commission is authorized to make payments in lieu of taxes. The established policy shall be not to exceed the taxes payable for the property and the condition in which it was acquired, except where special burdens have been cast upon the state or locality. The property and income of the Commission and its corporations are exempt from state and local taxation."

The minority report contained no comment on section 15.

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[49] House Report No. 1186, 79th Cong., 1st Sess.

In the meanwhile, the Senate had voted to establish a special committee on atomic energy. The written and oral testimony relative to the May-Johnson Bill had varied greatly.[50] Some felt that it imposed too much dictatorial power in an administrative body. Many scientists expressed strong disapproval, but what is important is that there is not a *single line* in the entire hearings even mentioning the new and different Congressional approach to State taxes attributed to the bill.

There was no reason to avert to tax matters. Section 15 and 16, as drawn, not only restated the constitutional exemption under the implied immunity doctrine, but the established and well understood federal policy applied "across the board" to all federal agencies.

The policy criticisms directed at the May-Johnson Bill caused a special committee in the Senate to undertake the drafting of a substantially new bill. This became the McMahon Bill, S. 1717. Section 4(e) required that the Commission itself produce fissionable materials and existing contracts were to be terminated within a year of the Act's enactment. Section 14, "Definitions," did not define "agents." Contractors were not included in the term "Government Agents."

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[50] See Miller, A Law is Passed—the Atomic Energy Act of 1946, 15 Univ. of Chicago Law Rev. 799-821 (1948).

The original text of the tax provision of the May-Johnson Bill (section 16 of H.R. 4280 and section 15 of H.R. 4566) was copied letter for letter into section 8(b) of the McMahon Bill. Since it eventually became the Atomic Energy Act of 1946, it is significant that the Special Committee on Atomic Energy spelled out the exemption from state and local taxes in precisely the same terms used by the authors of the earlier bills in strict conformance with established policy.

All bills introduced relating to the production of Atomic Energy maintained the existing state tax policy.[51] There was no attempt, either by testimony or argument, in all the hearings to alter that policy. In all bills introduced, the tax status of independent contractors is identical to that conceded to have been enunciated in the *Alabama v. King & Boozer* and *Druto* cases.

The contention of appellants is based entirely upon a change in the wording of the exemption clause made subsequent to the initial draft of S. 1717. Before examining the cause of this change in language, note that the final draft of the McMahon Bill again authorized the use of operating contractors. This was in line with the President's original message asking the utmost use of "free enterprise." In all previous

[51] See for example the McMahon Bill, S. 1359, 79th Cong., 1st Sess.; the Ball Bill, S. 1557, 79th Cong., 1st Sess.; and the Johnson Bill, S. 1824, 79th Cong., 2d Sess.

bills, such contractors were taxable. The question is then whether there is any evidence that a complete departure not only from the previous bills but from established policy was contemplated.

Following the introduction of S. 1717, extensive hearings commenced on January 22, 1946, and continued until April 8, 1946. In all these hearings we cannot locate a single line of testimony, comment or explanation to indicate that the Committee either intended or considered such a dramatic and fundamental change in policy. Nothing appears in either the House or Senate debates relative to the exemption section or its supposed intent.[32] We do note however, that the features of the bill which did depart from established policy were corrected. Changes were made to subject AEC expenditures to the Comptroller General and General Accounting Office[33] and the power to create corporations was removed.

Fortunately, the facts about the change in language in section 9(b) may be quickly and simply determined from the hearings. The first witness to

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[32] Hearings, Joint Committee on Atomic Energy, April 24, 1952, 82d Cong., 2d Sess. at p. 8.

[33] Compare section 12 of the bill as enacted with the statements of Lindsey C. Warren, Comptroller General of United States; Frank L. Yates, Assistant Comptroller General; and Edwin L. Fisher, Acting General Counsel, General Accounting Office; and Maj. Gen. Leslie Groves. Hearings, Special Senate Committee on Atomic Energy, S. 1717, 79th Cong., 2d Sess., part 5, p. 498 *et seq.*

testify on S. 1717 was Harold B. Smith, Director of the Bureau of the Budget. He appeared before the Special Committee on January 22, 1946.[54] Mr. Smith pointed out that the power given to the Commission in section 11(b) (4) to

> "create or organize corporations, the stock of which shall be wholly owned by the United States and controlled by the Commission, to carry out the provisions of this Act,"

was both unnecessary and contrary to the then recently adopted policy of the United States. He stated that the Commission could accomplish nothing through the creation of a corporation that it could not do by setting up a division of its own organization. He stated

> "The act of December 6, 1945, both reduced the privileges of such corporations and made clear the intent of the Congress to restrict the number of corporations in the future. I therefore recommend that you strike out of S. 1717 the grant of power to create corporations."[55]

Although Mr. Smith, whose special province is fiscal matters, including federal-state fiscal relationships, had previously unalterably opposed bills granting even less immunity than is claimed here, his testimony on S. 1717 indicates that he was completely

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[54] Hearings, Special Committee on Atomic Energy, S. 1717, part 1. January 22 and January 23, 1946, p. 38.

[55] Hearings, *Ibid.*, p. 38.

unaware of the alleged purport of section 9(b). Surely he above all would have at least mentioned this feature of the bill.

The special committee adopted Mr. Smith's recommendation. The authority to create corporations was deleted from the category of powers conferred upon the Atomic Energy Commission. This required an alteration of the tax exemption provision of section 9(b) (the renumbered section 8(b) of the original S. 1717). The revision was made by striking out of section 9(b) "corporations created by the Commission" since the Commission no longer had power to create such a corporation. In the revision of this sentence, the word "activity" was inserted so that the final version read and was enacted as follows:

> "The Commission, and the property, activities, and income of the Commission, are expressly exempted from taxation in any manner or form by any State, county, municipality, or any subdivision thereof."

Note the similarity of this language to the tax exemption accorded the Tennessee Valley Authority by sec. 13 of the T.V.A. Act. That Act provides, 16 U. S. C. A. section 831(1)

> "* * * and the Corporation,[56] its property, franchises and income, are hereby ex-

[56] The Tennessee Valley Authority is referred to in the Act as a "corporation," see 16 U. S. C. A. section 831.

pressly exempted from taxation in any manner or form by any State, county, municipality, or any subdivision or district thereof."

The sentences are substantively identical except that the word "activities" has been substituted for the word "franchises." In the absence of any other explanation, and there is absolutely none in either hearings, reports, or debates, the only inference is that the term "activities" was substituted as appropriate to a non-corporate entity, since "franchise" is a term of art applied only to corporations. Surely, if the term "activities" of the government agency were to have the broad and unusual scope attributed to it by appellants there would have been at least some mention of it in the hearings or the report.

The significance is even made more apparent since it is obvious that the drafters of section 9(b) of this Act used the T.V.A. Act as a form.[57]

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[57] T.V.A. Act, 16 U. S. C. A. § 831 begins:

"In order to render financial assistance to those States and local governments in which the power operations of the Corporation are carried on and in which the Corporation has acquired properties previously subject to State and local taxation, the Board is authorized and directed to pay to such States, and the counties therein, * * *."

Section 9(b) of the Atomic Energy Act, 42 U. S. C. A. § 1809(b) provides:

"In order to render financial assistance to those States and localities in which the activities of the Commission are carried on and in which the Commission has acquired property previously subject to State

This is not mere conjecture derived from identity of language but is disclosed by the hearings on S. 1717.[58]

The report of the special committee to Congress, on the final and enacted version refers to section 9(b) as follows:

> "The Commission is authorized to reimburse States and municipalities for loss in taxes incurred through acquisitions of property."[59]

There are two significant facts about this report; (1) it mentions nothing about the purported departure from established Congressional and Executive policy, and (2) no reference whatsoever is made to the specific sentence in section 9(b) defining the exemption. This could only mean that the Committee assumed that there was no change—that the change in language effected no departure from the previous bills on atomic energy which had continued existing policy.

The only logical conclusion for the report as made is that the Committee felt that the change in wording was to conform the language of this sentence to the substantive change in another portion of

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and local taxation, the Commission is authorized to make payments to State and local governments in lieu of property taxes. * * *"

[58] Hearings, Special Senate Committee on Atomic Energy, Part 5, April 4 and April 8, 1946, 79th Cong., 2d Sess. at pp. 519-521.

[59] Senate Report No. 1211, 79th Cong., 2d Sess. p. 22.

the bill, eliminating the power to create corporations as against existing policy. It could have nothing to do with contractors with the AEC because both the May-Johnson and McMahon bills contemplated that free enterprise through contractors would *continue* to play a large role. The policy enunciated by both bills and the final Act was to encourage and foster free enterprise and normal employee-employer relationships.

There was neither debate, comments on, nor mention of section 9(b) when S. 1717 passed both the House and Senate. This also is hardly consistent with such a fundamental change in policy. During the reading of the Bill in the House, some banter followed the reading of section 9(b) on the possible use of atomic energy to mutate physical species. Mrs. Luce, who initiated the discussion, later described it as a "humorous attempt to focus attention on the incredible potentialities of atomic energy," 92 Cong. Rec. 9469-70, 9556.

In order to contend that Congress intended normal business taxes upon the independent contractors with the AEC to be prohibited, it is necessary to assume

(1) The committees and individuals drafting all bills dealing with this Atomic Energy started out with an exemption along extant and familiar lines

applicable to all other contractors with the federal government.

(2) That without recommendation or discussion the Committee decided to depart from both precedent and practice and the policy of the President and grant private interests dealing with the AEC a discriminatory tax exemption which both Congress and the Executive branch had specifically and emphatically rejected every time the issue had been raised.

(3) That they did this to ease the tax burden on AEC appropriations even though state taxes alone on other defense contractors far exceeded the entire annual appropriations to the AEC.

(4) That this change was not even apparent to the Committee who drafted it since it was to accommodate a substantive amendment elsewhere.

(5) That all this was done without provoking a question in either the Committee, the House, the Senate, or in any record about such a fundamental change in policy.

It is inconceivable and certainly not to be presumed that a responsible committee of the Congress, consisting of the membership it had, would have deliberately initiated such a radical and complete departure from the previous bills and the established, accepted and well-understood Congressional and

Presidential policy, and yet withhold that information from the Congress whom its specific duty was to inform. If such a change was intended or even contemplated, the Committee would obviously have been aware of it. To say otherwise is to level serious charges at each and every member and at the sincerity with which he served. If aware of it, the Committee certainly would have made reference to it.

That the true intent of Congress was never to exempt contractors with the AEC, *particularly* from general business taxes, is shown by the passage of Public Law 262, 83d Cong., 1st Sess., completely eliminating the last sentence of section 9(b) in order to

> "* * * place the Atomic Energy Commission on a basis identical to that of the rest of the Federal Government with respect to said taxation"[**]

If one questions whether the policy of non-exemption had been established by Congress and the Executive, that statement plus the balance of the Senate report should answer.

On July 1, 1952, Mr. Gordon Dean, the then Chairman of the Atomic Energy Commission, wrote to Senator Brien McMahon, then Chairman of the

[**] Senate Report No. 694, July 28, 1953, to accompany S. 671, 83d Cong., 1st Sess., p. 1.

Joint Committee, relative to S. 3040 also designed to amend section 9(b), as follows:

> "The fact that exemption of the Commission's contractors from the taxes in question would mean an annual savings for the Federal Government of possibly as much as eight million dollars is impressive but by no means decisive. The Federal Government has long recognized that the activities of its contractors, no less than similar private activities, are ordinarily the beneficiaries of services provided at considerable cost by the states and localities. In such situations, the equity of making a fair contribution to State and local revenue through payment of taxes on the same basis as they were borne by similar non-governmental activities is apparent. Hence, the Federal Government has not sought a general exemption from State and local taxes for its contractors, even though such an exemption would substantially reduce the cost of carrying out essential government functions."

7. Interpretation of the Act Itself

A. Rules of Statutory Construction:

A rule of statutory construction so fundamental as to require no citation is that statutes purporting to grant tax exemptions must be strictly construed against the exemption. The exemption must be clearly, unequivocally and affirmatively established. *Standard Oil v. Fontenot*, 198 La. 644, 4 So. (2d) 634 (1941); *Smith v. Davis*, 323 U. S. 111 at 117 (1944); and *Yazoo Railroad Co. v. Thomas*, 132 U. S.

174 at 185 (1889). This rule has double force when encroachment on a state's tax power is involved. *Graves v. New York ex rel. O'Keefe*, 306 U. S. 466, 487 (1939).

The AEC may enter varying types of contracts calling for purchases, performances, etc., and on a cost, lump sum and/or a competitive bid basis, section 4(c), 42 U. S. C. A. § 1804(c)(2). No differentiation is claimed or made as to tax or other consequences.

To obtain the meaning of the last sentence of section 9(b), the whole must be read. After providing for payments to local government in lieu of property taxes to *assist* those governments, the exemption is set forth. To read this section as do appellants, Congress must have intended to deprive local governments of badly needed tax revenues in the last sentence in complete opposition to the first portion.

If the exemption were intended to have such a new and unusual scope, why was it not specific? Previously, when Congress has spoken of state taxes, it has done so clearly and without ambiguity.[61]

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[61] See the Reconstruction Finance Act, 15 U. S. C. A. § 607; Federal Farm Loan Act, 12 U. S. C. A. §§ 701, 931 and 932; Federal Farm Mortgage Corporation, 12 U. S. C. A. § 1020(f); Farm Credit Corporations, 12 U. S. C. A. § 1138 *et seq.*; and Home Owners Loan Act of 1933, 12 U. S. C. A. § 1464(h). Note in none of these acts has Congress declared an exemption beyond where the legal incidence of the state tax is directly upon either its instrumentality or the contract or its instrumentality. Such is the constitutional immunity.

It is of high importance that the only specifically applicable provision of the entire Atomic Energy Act, section 4(c)(2) specifically describes the performance of AEC's contractors as *"activities" of the contractor.* When the Commission operates a plant through its own employees, as it specifically may, it is an "activity" of the Commission, not the contractor. *Only* the "activities" of the Commission are exempt. Nothing is said about exempting the "activities" of the contractor as specifically described in section 4.

B. Government Agencies Uniformly Utilize Contractors:

In *Carson v. Roane-Anderson*, the Government argued that since, if the AEC itself performed the work it would be exempt, that those to whom the work was contracted must also have been intended to be exempt. The fallacy should be clear. When *any* governmental entity performs the work it is exempt. When such entities contract the work out, their immunity does not go with it under established Constitutional precepts and Congressional and Executive policies. If Congress has never intended such results for like agencies with

> "comparably situated contractors of other agencies and departments"[52]

[52] S. Rpt. No. 694, Joint Committee on Atomic Energy, 83d Cong., 1st Sess., p. 2.

how can it be presumed Congress so intended with the AEC? The presumption, if any, would be that Congress intended the norm, particularly since there is nothing in the entire history of this or any other bill submitted to support any belief that Congress or the Committee contemplated a departure from established standards. The inconsistency of appellants' assumptions is made more glaring by the fact that AEC's increased costs due to such taxes were but a fraction of a percentage of the total defense contract fiscal picture.

C. Activities:

The term "activities" is considered to have controlling significance, superseding other features of the Act, legislative history, Constitutional precepts, and established Congressional and Executive fiscal policies in the Federal-State field.

There is no magic in this term. It is generic and indefinite, closely paralleling its archetype, the word "acts." Yet if the word "acts" is substituted for "activities" in section 9(b), appellants' contentions collapse. The "act" of one entity cannot be the "act" of another unless an agency relationship exists. The same is true of the "activities" of such an entity.

This Court itself has used the term in the implied immunity field. In *United States v. Allegheny County*, 322 U. S. 174 at 177 (1944), it is stated:

> "But unshaken, rarely questioned, and indeed not questioned in this case, is the principle that possessions, institutions and *activities* of the Federal Government itself in the absence of express Congressional consent are not subject *to any form* of state taxation." (Emphasis supplied.)

Notice how this Court's use of the identical term specifically coincides with our analysis—that section 9(b) merely restated existing precepts.

Why was the term "activities" used? Taxes are imposed on property, upon persons, upon income, and upon business activities. Excise taxes on activities, or as to corporate entities, the exercise of franchises, take many forms. The draftsman who inserted "activities" in section 9(b) in a similar manner to "franchises" in the TVA Act was perfectly correct and sound. However, the "activities" of one cannot be the "activities" of another who is independent any more than the exercise of a franchise by one corporation can be the exercise by another and independent corporation of *its* franchise. The connotation of the term "activities" is practically identical to the term "power operations" used in the TVA state tax provision which was the model for section 9(b). This makes the substitution of "activities" for "franchises" doubly significant.

The *only* manner by which the acts, activities, or operations of one entity can be those of another,

whether on a horizontal or vertical plane, is when agency exists. Agency and independence are mutually exclusive concepts. General Electric cannot be both relative to one act or activity.

The issue of independent vs. agent contractor is presumably as foreclosed to this court as it was to the State Supreme Court—by admission. The logico-legal results flowing from the independent nature of the contractual relationship must and have also been admitted.

A general business tax imposed on an entity legally independent from Government is and must be valid so long as legal and not economic incidence is the law. To hold it otherwise requires the overruling of cases too numerous to list in this portion of our argument.

8. Conclusion Relative to Section 9(b)

Only by the above analysis do *all* parts of the picture fit—(1) section 9(b) will be consistent within itself; (2) with predecessor bills; (3) with other laws; (4) with the general Congressional policy to assist hard-pressed state and local governments; (5) with the established Congressional and Executive policy to stabilize immunity at the Constitutional and just level; (6) with logic; (7) with all patterns of existing law; (8) with sound rules of statutory construction; (9) with that portion of the Act specif-

ically referring to *activities* of contractors; and (10) the policy of encouraging free enterprise and against establishing a discriminatory tax favoritism in the government contract field.

Even should Congress have the power to encroach upon the constitutional rights of citizens, either individually or as states, the exercise of that power, as inherently contrary to democratic theories as it is, should never be presumed either from ambiguous language or lack of evidence to the contrary. The presumption should *always* be the other way.

VI. Washington Has Not Attempted To Benefit at Federal Expense

Since "protection" of federal functions may perhaps be made an issue, we feel it not amiss to mention that Washington has in no way altered its conduct to benefit from the decision of the federal government to engage contractors on a large scale in this state. The contrary is the fact. Not only did our pertinent tax law, the Revenue Act of 1935, long pre-exist World War II and any of its contracts, but in 1941, cognizant of our defense needs and *all* of our duties, the Washington sales and use tax (3%) law was amended so that it would not apply to government contractors.

Prior to 1941, Washington contractors doing work for others were "consumers" and thus paid a sales tax on their purchases. This was an added item in either lump sum or cost contracts and was of course passed on. This was the Alabama tax plan held valid by the shortly to be decided *Alabama v. King & Boozer* case.

The 1941 Amendment imposed the tax upon the one for whom the contractor did the work (the Tennessee sales and use tax plan)[63]—on his sales of labor and materials rather than his purchases. Thus in

[63] (R. 169-170); *Klickitat County v. Jenner*, 15 Wn. (2d) 373 at 377, 130 P.(2d) 880 (1942).

government contracts, the tax would have been upon the government. It would have been invalid and therefore was an "exempt sale" under our statute. Having obtained the 3% benefit, the appellant, its predecessor, and the AEC contest the ¼ of 1% amount. No other government instrumentality has done so. It might seem that cooperation between the departments of each government might be a mutual concept—contemplating observance at both ends.

Both the appellant and the government were thoroughly familiar with and had examined and discussed the application of existing local laws with local tax authorities (R. 147 *et seq.*). They drew their contract prior to the enactment of the Atomic Energy Act and in a manner so that General Electric was admittedly taxable under the *Silas Mason v. Tax Commission*; *James v. Dravo Contracting Co.*; and *Alabama v. King & Boozer* decisions.

ARGUMENT—Part 2

VII. Basic Principles of Sovereign Tax Immunity

It has never been questioned that the United States itself is not subject to state taxation. On the other hand, there is no doubt but that a state tax laid upon a private person alone may not be escaped simply because he deals with either government. The difficulty lies between these poles.

The simple contrast between a tax due from or owed by the government and the one from private persons is the simplest and soundest criterion. Examination of all other tests but requires a return to the test of legal incidence.

"Legal incidence" sounds like but is not formalistic. It describes "who owes the tax—who is the obligor." Legal incidence must necessarily be the test so long as we have a government of law.

We disagree with the assertion that this Court, in 1937 and 1941 completely reversed the precepts of constitutional taxation followed for 135 years since *McCulloch v. Maryland*, *supra*, 4 Wheat. 316 (U. S. 1819). The totality of *holdings* demonstrates a generally consistent pattern allowing for reasonable variant not particularly in decision but in reasonings. A tax is invalid if its legal incidence is *upon* the other government, its property, its instrumentalities, or its

contracts (the term includes bonds, mortgages, etc.), in sum, its activities, *United States v. Allegheny County, supra,* no matter where the economic incidence falls.[64] A contractual right to reimbursement is immaterial. It should be no surprise that legal incidence (although often unmentioned) has governed through the years—we are dealing with law and the "legal" concept of dual sovereignty.

That the economic incidence test is discredited should also prove no surprise—while our sovereigns are dual, our economy is single. Each or any tax imposed on private persons who do business with government has a measurable economic effect upon both governments. This is just as true of the taxes imposed upon those who deal with those who deal with government. Thus, taxes of all forms on "A" affect "B" which in turn affect "C" which in turn affect General Electric which in turn affect the government. The tax on each link has as much effect upon the government as the tax on any other since the only effect upon government is the economic burden.

It is this that caused Chief Justice Marshall's statement in *McCulloch v. Maryland,*

> "We are not driven to the perplexing inquiry, so unfit for the judicial department, what

[64] The exceptions are (1) that a federal tax upon the proprietary activities of a state is valid and (2) that Congress may waive federal immunity.

> degree of taxation is the legitimate use and what degree may amount to abuse of the power." 4 Wheat. at 429.

and the dissent of Justice Holmes in *Panhandle Oil Co. v. Mississippi*, 277 U. S. 218 (1928):

> "The cost of maintaining the State that makes the business possible is just as necessary an element in the cost of production as labor and coal" (p. 224)

and Justice Jackson in *United States v. Allegheny County, supra*, 322 U. S. 174 (1944):

> "* * * Nor is the validity of the tax dependent upon the ultimate resting place of the economic burden of the tax" (p. 189).

Further, *Home Savings Bank v. Des Moines*, 205 U. S. 503 at 519 (1907):

> "The question is one of power and not economics."

Between the poles of obvious taxability and obvious immunity lie the "transactions" taxes. These are normally (1) upon or (2) measured in some way by, contracts with either government. Examples of excise taxes *upon* a transaction are sales and use taxes, mortgage taxes, certain stamp taxes, stock or bond taxes, etc. The legal incidence of such taxes is normally directly upon the contract. They specifically contemplate the transaction—without it there would be no tax. Such taxes have either been

held invalid as a constitutional doctrine or the court has held Congress has power to exempt its transactions, *Federal Land Bank v. Bismarck Lumber Co.*, 314 U. S. 95 (1941). We have no quarrel with either statement except that latter should be couched in terms of refusal to waive immunity.

Of all taxes, those most directly upon and measured by business activity or the performance of a contract are the various payroll taxes. These are normally used to provide funds for specific state benefits to workmen.

1. Tests of Tax—General

Six general tests have been advanced in various cases to test tax effects upon government. "Immediacy" of effect refers to legal rather than economic concepts. These tests are not mutually exclusive. They are but different routes to the same conclusion.

Example of category "(2)" above—taxes in some way measured by contracts with a government —are gross or net income taxes, gross receipts or franchise taxes, some capital stock taxes, etc. Even though the amount of the tax may be increased by a transaction with either government, the tax does not specifically contemplate transactions. Method of measurement is not of particular importance. The tax is as completely upon the private person as a poll tax. The measurement is not an attempt to tax the

value of the transaction but to equitably measure the cost of benefits received. It should make no difference that this measure is approximate rather than specifically computed as in property taxes. We can locate no attempt of Congress to exempt private persons from these types of taxes.

The tests may be classified as follows:

(1) Whether or not the tax is upon the source;

(2) Whether the tax is a direct or indirect burden upon the government;

(3) Whether there is interference with the government's functions;

(4) Whether the economic burden of the tax is borne by the government;

(5) Whether the tax is discriminatory;

(6) "Protection" of government functions;

(7) Whether the tax is imposed upon the government or the private person—the legal incidence test.[65]

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[65] Other characterizations of taxes have been made but none seem to have been advanced as a means by which to distinguish the valid from the invalid. For example:

A. *Invalid taxes*: Those constituting a threat to the independence of the state or nation, *The Banks v. the Mayors*, 7 Wall. 16 at 25 (U. S. 1868); *The Collector v. Day*, 11 Wall. 113, 124-126 (U. S. 1870); overruled by *Graves v. New York ex rel. O'Keefe*, 306 U. S. 466, 486 (1939); *Helvering v. Powers*, 293 U. S. 214 at 224-225 (1934).

Those which are derogatory to the dignity of the government are:

The Washington tax is not and has not been alleged (1) to be a tax on the source of General Electric's funds, (2) to be a burden to government functions, (3) to interfere with AEC functions, (4) to be discriminatory, (5) to be imposed upon the government or its operations, and (6) no feature of the tax is asserted from which the government requires protection. The economic burden of the tax, caused by the contractual agreement of the government to reimburse General Electric, has not even been argued—merely assumed.

California v. Pacific Railroad Co., 127 U. S. 1 at 41 (1888); *Macallen Co. v. Massachusetts*, 279 U. S. 620 at 628 (1929).

Those involving the power to destroy:

McCulloch v. Maryland, 4 Wheat. 316, 427, 430-431 (1819); *The Collector v. Day, supra*; *Smith v. Kansas City Title Co.*, 255 U. S. 180 at 212, 213 (1921); *Gillespie v. Okla.*, 257 U. S. 501 at 505 (1922), overruled by *Helvering v. Producers Corp.*, 303 U. S. 376 at 387 (1938).

B. *Valid taxes*: Those necessary to maintain tax sources. *South Carolina v. United States*, 199 U. S. 437, 455, 463 (1905); *Willcuts v. Bunn*, 282 U. S. 216, 225 (1931); *Helvering v. Producers Corp.*, 303 U. S. 376, 384 (1938). Those which repaid the government for tax-suported benefits received by the citizen. *Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530, 548 (1888); *Helvering v. Gerhardt*, 304 U. S. 405, 420, 421 (1938).

2. Tax on Income a Tax on the Source

Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429, 583, 584, rehearing, 158 U. S. 601, 618 (1895), held Congress had no power to impose an income tax upon the principal or interest of a state or municipal bond. The legal incidence of the tax was upon a state contract, but the reasoning was that a tax measured by income was a tax on the source. Further "economically" it affected the borrowing power of the state (pp. 584-586). The same analysis was applied in several subsequent cases.[66]

The formula has been rejected. A tax measured by income is neither "legally or economically a tax on its source." *Graves v. New York ex rel. O'Keefe*, *supra*, 306 U. S. 466, 480-481 (1939).[67]

The income-source formula would have invalidated taxes sustained in the *O'Keefe* case and in *Met-*

[66] *Gillespie v. Oklahoma*, 257 U. S. 501, 506 (1922), overruled; *Northwestern Insurance Co. v. Wisconsin*, 275 U. S. 136, 140 (1927), the court held, perhaps incorrectly, that the legal incidence was upon government bonds (p. 141); *Long v. Rockwood*, 277 U. S. 142, 147 (1928), royalty from patents invalid as a tax on the power to issue patents; *Burnet v. Coronado Oil Co.*, 285 U. S. 393, 400-401 (1932), overruled, *Helvering v. Producers Corp.*, *supra*, 303 U. S. at 387. Each of these cases except *Northwestern Insurance* has been expressly overruled. When the Government bids competitively in various markets, it does not seek an advantage but equality with private enterprise. *Helvering v. Gerhardt*, 304 U. S. 405 at 421-422 (1938).

[67] See also, *New York ex rel. Cohn v. Graves*, 300 U. S. 308, 313-314 (1937); *cf. Hale v. State Bd.*, 302 U. S. 95 (1937).

calf & Eddy v. Mitchell, 269 U. S. 514 (1926); *Fox Film Corp. v. Doyal*, 286 U. S. 123, 128 (1932), the power of a state to tax exists as soon as the ownership is changed. *James v. Dravo Contracting Co., supra*, 302 U. S. 134 (1937); *Helvering v. Producers Corp., supra*, 303 U. S. 376 (1938); *Silas Mason v. Tax Commission, supra*, 302 U. S. 186 (1937); and *Alabama v. King & Boozer, supra*, 314 U. S. 1 (1941). Prior to the specific repudiation in the *O'Keefe* case it was discredited by *New York ex rel. Cohn v. Graves, supra*, 300 U. S. 308, 313-314 (1937); and *Hale v. State Board, supra*, 302 U. S. 95, 106-108 (1937).

This element is not present in this case since it has nowhere (nor could it have) been alleged that the Washington tax on General Electric's gross income is a tax on the source.

3. Tax A Burden

This formula, found in *Panhandle Oil Co. v. Knox, supra*, 277 U. S. 218, 222 (1928), appears to have been generally used as makeweight to sustain or invalidate a tax either valid or invalid under the legal incidence test. For example, in the *Panhandle* case itself, the legal incidence fell directly upon the contract of (sale to) the government. Generally this reasoning has been used to sustain a challenged tax because

the burden, if any, upon the operations of government were said to be indirect or remote.[68]

We have located no case holding a "burden" to exist when the legal incidence of the tax was upon a private person.[69] The phrase "tax a burden" has superficial attractiveness. However, a "burden" is a conclusion, not a test devised to obtain a conclusion. Economically, *all* taxes "burden" not only the funds

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[68] See *Educational Film Corp. v. Ward*, 282 U. S. 379, 392 (1931); *Alward v. Johnson*, 282 U. S. 509, 514 (1931); *Indian Territory Oil Co. v. Board*, 288 U. S. 325, 328 (1933); *Group No. 1 Oil Corp. v. Bass*, 283 U. S. 279, 282 (1931); *Burnet v. A. T. Jurgens Trust*, 288 U. S. 508, 514 (1933); *Trinityfarm Co. v. Grosjean*, 291 U. S. 466, 472 (1934); *Taber v. Indian Territory Co.*, 300 U. S. 1, 3-4 (1936); Cardozo, J., dissenting in *Texas Co. v. Graves*, 298 U. S. 393, 406 (1936); Roberts, J., dissenting in *James v. Dravo Contracting Co.*, 302 U. S. 134, 164 (1937); *National Bank v. Commonwealth*, 9 Wall. 353, 362 (U. S. 1869); *Railroad Co. v. Penniston*, 85 U. S. 5 (Wall. 1873); *Home Ins. Co. v. New York*, 134 U. S. 594, 598 (1890); *Central Pacific Railroad v. California*, 162 U. S. 91, 126 (1896); *Fidelity & Deposit Co. v. Penn.*, 240 U. S. 319, 323 (1926); *Metcalf & Eddy v. Mitchell*, 269 U. S. 514, 524, 525, 528 (1926); *Willcuts v. Bunn*, 282 U. S. 216, 226 (1931); *Helvering v. Producers Corp.*, 303 U. S. 376, 384, 387 (1938); *Helvering v. Gerhardt*, 304 U. S. 405 (1938).

[69] For cases referring to taxes as a "burden," see *Dobbins v. Erie County*, 16 Pet. 435, 449 (U. S. 1842), the legal incidence of a state property tax was upon the office of a federal officer; *Home Savings Bank v. Des Moines*, 205 U. S. 503 (1907), legal incidence of property tax on bank property was on government securities; *Farmers' Bank v. Minnesota*, 232 U. S. 516, 526 (1914); *Macallen Co. v. Massachusetts*, 279 U. S. 620, 624 (1928), the legal incidence of the tax was upon a contract of the government; *Missouri v. Gehner*, 281 U. S. 313, 321 (1930), a tax on government bonds.

of the other but the same sovereign. See *Allan v. Bd. of Regents*, 304 U. S. 439 (1938). The economic effect upon the Federal treasury of one tax can be no worse than another. We submit that in the tax (rather than regulatory) field, the "burden" principle resolves itself to the non-discrimination test. It is difficult to picture a situation—certainly none is present here—where a non-discriminatory gross income tax of minute percentage could substantially interfere with or burden government functions any more than any other element in the general cost of production.

> "The cost of maintaining the State that makes the business possible, is just as necessary an element in the cost of production as labor and coal" Holmes' dissent in *Panhandle Oil Co. v. Mississippi*, 277 U. S. 218 (1928).[70]

There has been neither contention nor inference that the Washington tax burdens either the government or the AEC. Such a contention would be directly in the face of *Graves v. New York ex rel. O'Keefe, supra*, 306 U. S. at 480-481.

4. Interference With Government Functions

This concept is closely related to the "burden" test although more in the active than the passive

[70] The Washington tax here involved is specifically, in so far as legally possible, a part of the cost of production—"a part of operating overhead"—Rem. Rev. Stat., § 8370-14, in force since 1935.

sense. Here too a conclusion rather than a test is stated. It is difficult to ascertain the meaning of the statement that a tax "interferes with" or "burdens" the government's transactions. A regulatory measure enacted in the form of a tax statute might interfere with the performance of a federal function. This would be invalid.[71] Conceivably, a state's method of collecting an otherwise valid tax might interfere with federal functions. However, the possible invalidity of the collection procedure would not invalidate the tax.

The problem is not posed here, but could a specific Congressional declaration that certain state taxation burdens or interferes with federal functions so constitute the tax where it would not have been under the Constitution? Legislative declarations are entitled to weight, but can they change a fact upon which the declarant's own constitutional powers are tested? This would seem too closely akin to "lifting oneself by the bootstraps."

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[71] See *Osborne v. United States Bank*, 9 Wheat. 738, 867 (U. S. 1824), use of statutory collection procedures to collect an invalid direct tax against a U. S. bank; *Pembina Mining Co. v. Pennsylvania*, 125 U. S. 181, dicta at pp. 186, 190 (1888); cf. *Arizona v. California*, 283 U. S. 423, 451-452 (1931), holding that the United States need not first obtain state permission to dam a navigable river.

5. Economic Burden

A tax basically is composed of but two elements: (1) the obligation to pay, and (2) the money paid. The latter is loosely termed the "economic incidence." It is deemed to rest upon the one who has no opportunity to recoup the "loss" by passing the cost to the consumer.

The term may perhaps be better phrased as "ultimate" economic incidence although the concept of ultimate economic incidence or burden is probably fictional. Our economy is basically circular rather than linear and thus even the ultimate consumers pass on the cost. The wage earner demands higher wages and the government-consumer levies higher taxes.

Subject to the above caveat the consumer, government or otherwise, pays all taxes. The economic burden is no less because the tax is imposed on a predecessor to the contractor in the economic chain.

The economic incidence of a tax as a criteria has been as completely and as finally rejected as judicial concepts permit.

The economic burden test has a certain appeal. Its fallacy lies in the fact that we are dealing with dual sovereigns operating within a single economy, and that each tax of one sovereign economically burdens the other (under the linear approach). For this

reason, to apply this test to its logical conclusion would mean the elimination of all taxes. The only obstacle would be traceability, and this would be simple for American ingenuity to overcome. Note too that a tax on the original producer may be much larger, and thus constitute a greater burden to the purchasing government than a gross business tax imposed upon the government's supplier.

The economic test was first rejected in *McCulloch v. Maryland*, itself:

> "We are not driven to the perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legitimate use and what degree may amount to an abuse of power" 4 Wheat. at 450.

We have found no case in which economic burden alone existed, where the tax has been invalid.[72]

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[72] Legal incidence existed, in each of the cases commonly cited, to sustain the economic approach. See *Weston v. City Council of Charleston*, 2 Pet. 449, 468 (U. S. 1829), Marshall, C.J.: "The tax in question is a tax on the contract between the government and the individual." p. 464. *Dobbins v. Erie County*, 16 Pet. 435, 448 (U. S. 1842); *Gillespie v. Oklahoma*, 257 U. S. 501, 506 (1922). See the dissenting opinions in *Jaybird Mining Co. v. Weir*, 271 U. S. 609, 615, 618 (1926); *National Life Ins. Co. v. United States*, 277 U. S. 508, 528 (1928); *Macallen Co. v. Massachusetts*, 279 U. S. 620, 637 (1928); *Missouri v. Gehner*, 281 U. S. 313, 331 (1930); *Indian Motorcycle Co. v. United States*, 283 U. S. 570, 581 (1931); *Schuylkill Trust Co. v. Pennsylvania*, 296 U. S. 113, 127 (1935); *Graves v. Texas Co.*, 298 U. S. 393, 406 (1936). This test has been most recently denounced by *Alabama v. King & Boozer, supra*, 314 U. S. 1 (1941) and *Esso Standard Oil Co. v. Evans*, 345 U. S. 495 (1953).

One might presume that passage of the economic burden lies back of each decision invalidating taxes because of an intergovernmental immunity. Where the legal incidence is on a private person, it can *only* be through the shifting of the economic incidence that the government would in any way be affected. If Congressional power to exempt rests upon passage of the economic burden, it cannot logically be limited to taxes only upon the one nearest the government. Yet to draw the power out further is to deny it. The logical application is well stated by Senator John Bricker[73] of Ohio:

> "It seems to me if this principle were applied generally, that the Federal Government could wipe out a lot of states pretty near, and also local governments."

The economic burden doctrine was specifically denied in *Alabama v. King & Boozer*, 314 U. S. 1; and in *United States v. Allegheny County*, 322 U. S. 174 (1944) at 186:

> "Nor is the validity of the tax dependent upon the ultimate resting place of the economic burden of the tax."

Note that in the *Allegheny County* case the legal incidence of the tax was upon property of the federal government, while the economic burden was upon a

[73] Hearings, Joint Committee on Atomic Energy, 82d Cong., 2d Sess., on State Taxation of Atomic Energy Commission Contractors, April 24, 1952, p. 16.

private person leasing that property. In *Trinityfarm Construction Co. v. Grosjean*, 291 U. S. 466 (1934) at 471, the validity of the tax

> "does not depend upon the amount of the exaction, the weight of the burden or the extent of the resulting interference with sovereign independence. Where it applies the principle is an absolute one, wholly unaffected by matters of distinction or degree. *Indian Motorcycle Co. v. United States*, 283 U. S. 570, 575, and cases cited."

The analysis of the federal government in *Alabama v. King & Boozer*, 314 U. S. at 4-6 would seem particularly appropriate:

> "When the Government buys an article, or receives goods or services under contract, it must in the normal course pay all costs required for the finished product. These costs include taxes of all forms. There is no economic reason why these taxes should be valid and a tax upon the final transaction, sale or delivery to the Government, invalid. True it is probable that the final tax would somewhat more certainly be shifted to the Government than those anterior in point of time. But even the final tax is by no means certain to be shifted. See Mr. Justice Stone dissenting in *Indian Motorcycle Co. v. United States*, 283 U. S. 570, 581. And the earlier taxes could easily be isolated through accounting procedures and by contract be made specifically reimbursable by the Government; yet none would suppose the resulting certainty of tax incidence upon the Government would invalidate taxes otherwise unobjectionable.

"For these reasons, the economic test is illusory and incapable of consistent application. * * *

"The rules of intergovernmental tax immunity, so far as they have been developed and applied to private persons who deal with the Government, exhibit a great diversity of decision and reasoning. A number of cases have expressly been overruled; many more have been distinguished on the narrowest of grounds; and in still other decisions technical rules have been devised to reach results in practical contradiction of earlier cases. *In short there is no single decision exempting a private taxpayer from a nondiscriminatory tax which can with confidence be said to be a good law today.* * * *

"The validity of taxes challenged as invading the immunity of the Government should be decided, we therefore submit, in terms of the legal incidence." (Emphasis Supplied.)

And further

"The question is one of power and not economics."

Home Savings Bank v. Des Moines, 205 U. S. 503 at 519 (1907). In *James v. Dravo Contracting Co.*, 302 U. S. 134 at 160, the government conceded that the gross receipts tax on its contractor would be shifted to it, but stated:

"But if it be assumed that the gross receipts tax may increase the cost to the Government, that fact would not invalidate the tax."

In *Helvering v. Gerhardt*, 304 U. S. 405, the court listed (pp. 418-419) a dozen cases where

> "taxpayers have been held subject to federal income tax notwithstanding its possible economic burden on the state."

And said (at p. 422)

> "The mere fact that the economic burden of such taxes may be passed on to a state government and thus increase to some extent, here wholly conjectural, the expense of its operation, infringes no constitutional immunity. Such burdens are but the normal incidence of the organization within the same territory of two governments, each possessed with a taxing power."

And see *Graves v. New York ex rel. O'Keefe*, 306 U. S. 466 (1939). The court at several points noted that it was not enough to invalidate a tax

> "That the expenses of one government might be lessened if all those who deal with it were exempt from taxation by the other." (pp. 483-484, 487.)

The economic burden of all taxes will be shifted.[74] This is necessary and plausible. Taxes are the cost of maintaining governmental facilities without which the production of the goods and services would either be impossible or prohibitively expensive.

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[74] See Bulletin, National Tax Association (1929-1930), p. 260; Martin, Distribution of the Consumption Tax Load, 7 Law and Contemp. Prob., 445-466 and authorities cited.

The *Dravo* case was concerned with a gross receipts tax; the *Indian Motorcycle* case and the *Alabama v. King & Boozer* case involved sales taxes; *Alward v. Johnson*, 282 U. S. 509 (1931) involved a gross receipts tax from the operation of a stage line carrying mail; and *Curry v. United States*, 314 U. S. 14 (1941) the companion case to *Alabama v. King & Boozer* involved a use tax charged against a cost-plus-fixed-fee contractor who received government reimbursement therefor. Therefore, the opinions in these cases mean that any tax imposed upon and paid by a private person can have no more than a speculative or uncertain effect upon the government with which he deals. The existence or nonexistence of an economic burden upon the government is not the touchstone of validity. The contractual assumption of the tax by an agreement to reimburse cannot effect invalidity of a tax.

6. Discrimination as a Test

No one would doubt that a tax which discriminated against either government or those who dealt with it would be invalid. A discriminatory tax singling out a governmental function to bear abnormal and unfriendly burdens does in truth involve the power to destroy. Compare *McCulloch v. Maryland*, 4 Wheat. 316 (U. S. 1819); and *Veazie Bank v. Fenno*, 8 Wall. 533 (U. S. 1869). It therefore must

be admitted that a tax, to be valid, must be nondiscriminatory. But, can a nondiscriminatory tax on a private, independent person be a burden—or is a nondiscriminatory tax but a normal incident of costs?

A tax which discriminates is constitutionally invalid for reasons other than intergovernmental immunity. This may be shown by the converse. A tax imposed directly upon the government is still not valid simply because nondiscriminatory. Thus, a tax which (1) was discriminatory, and (2) was imposed upon either government would be invalid for two reasons.

The decision in *McCulloch v. Maryland*, *supra*, and *Osborne v. United States Bank*, 9 Wheat. 738 (U. S. 1824), could well have been decided upon the highly discriminatory nature of the taxes under consideration. However, the court in a subsequent opinion, *Bank of Commerce v. New York City*, 2 Black 620 (U. S. 1862) rejected the argument that a state property tax might be applied to a federal security merely because it was nondiscriminatory. We have found no tax held invalid because discriminatory, such language normally is used in sustaining an otherwise valid tax.[75]

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[75] *Willcuts v. Bunn*, 282 U. S. 216, 225-227, 229 (1931); *Taber v. Indian Territory Comp. Co.*, 300 U. S. 1, 3-5 (1936); *Helvering v. Mountain Producers Corp.*, 303 U. S. 376, 384-387 (1938); *Helvering v. Gerhardt*, 304 U. S. 405, 413, 420 (1938); *Pacific Co. v. Johnson*, 285 U. S. 480, 493-496 (1932); and *Graves v. New York ex rel. O'Keefe*, 306 U. S. 466, 480, 484-485, 487 (1939).

7. "Protection" of Government Functions

The meaning of the phrase that Congress has the right to "protect its functions" is unclear. It implies that Congressional functions are unprotected by the Constitution, even though this was the basis of not only the first but, we submit, at least 99% of the decisions in this field.

Since the Constitution protects against all but the economic burden being passed to the government, the protection concept can only relate to this factor. If it does, is there any limit? Can anyone who can show a tax was imposed upon him by virtue of his production, ownership or sale of a product which ultimately reached the AEC be exempt those taxes? Why should there be a difference between constitutional and legislative concepts particularly when the legislative is based in the Constitution?

> "Taxation is a sacred right, essential to the existence of government—an incident of sovereignty. The right of legislation is co-extensive." *Dobbins v. Erie Co.*, 16 Pet. 435 at 446 (U. S. 1842).

The "protection" concept, viewed in its true light sounds suspiciously like "protection from dual sovereignty," "protection from the American economy," or even "protection from the Constitution itself."

8. Legal Incidence

If the legal incidence of a state tax is imposed upon the federal government it is invalid even though the economic burden is either directly upon or passed to a private person, *United States v. Allegheny County*, 322 U. S. 174 (1944). Conversely, if the tax is owed by a private person, it is valid even though he adds an identical amount to the costs of his goods or services and passes this to his customer the government.

The doctrine that the sovereign is exempt from taxation has been explained in terms of royal prerogative, *Rex v. Cook*, 3 Tr. 519, 522 (1790); and *Coomber v. Justice Berks*, 9 A.C. 61 (1883). But except as it inheres in the concept of sovereignty, the doctrine is unrelated to the intergovernmental problems of our country. Our nation's problem and answer turns upon the language and inferences of (1) Article VI—the supremacy clause; (2) Article I, section 8, para. 17—the necessary and proper clause; (3) Amendment X—all powers not delegated are reserved to the states; and (4) of our federal Constitution, and our general federated structure.

The enumerated powers granted to Congress are both by logical necessity and express provision made supreme over state enactments in fields where both have constitutional powers. The remaining powers

of the states are by definition unqualified and unaffected by the powers conferred upon the central government. They are of full sovereignty and untouched by federal powers. It would be consistent neither with Constitution nor with mutual independence or sovereignty to subject either the state in the governmental field[76] or the nation to the tax collection machinery of the other.

A state tax, the legal incidence of which is upon a private person, may be collected through a federal instrumentality which in itself could not be taxed. In *National Bank v. Commonwealth*, 9 Wall. 353, 362-363 (U. S. 1869) the court sustained a state tax on the shareholders of a national bank collected by the bank which reimbursed itself from the shareholders. The tax could not have been imposed upon the bank.

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[76] The state is directly subject to taxation in its proprietary activities; *New York v. United States*, 326 U. S. 572 (1945) and cases cited. This doctrine is based upon the theory that the powers of state government are unlimited and thus, if the principle of sovereign immunity were applied it would seriously diminish federal revenue, whereas the powers of Congress are limited and express. Therefore, all powers granted to Congress rise to the same dignity and the proprietary—governmental distinction is not applicable, since it is argued, Congress may not engage in activities except those specifically enumerated or those necessary and incidental thereto, that no or little danger to state revenues exists.

The decision has been followed in many subsequent cases.[77]

In *Colorado Bank v. Bedford*, 310 U. S. 41 (1940) a tax on the privilege of renting safe deposit boxes was upheld, even though collected from the federal instrumentality and the legal incidence was upon the private user. The court, pp. 52-53:

> "The person liable for the tax, primarily, cannot always be said to be the real taxpayer. The taxpayer is the person ultimately liable for the tax itself * * *. As the user directly furnishes the funds for the tax, not as an ultimate consumer with a transferred burden but * * * as *the responsible obligor*, we conclude the tax is upon him, not upon the bank * * *.
>
> "The tax being a permissible tax on customers of the bank, it is settled by our prior decisions that the statutory provisions requiring collection and remission of the taxes do not impose an unconstitutional burden upon a federal instrumentality." [Emphasis Supplied.]

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[77] *Lionberger v. Rouse*, 9 Wall. 468 (U. S. 1869); *Bellsgap R.R. Co. v. Penn.*, 134 U. S. 232, 239 (1889); *Van Slyke v. Wisconsin*, 154 U. S. 581 (1871); *Aberdeen Bank v. Chehalis County*, 166 U. S. 440, 444-446 (1896); *Merchants' Bank v. Penn.*, 167 U. S. 461, 466 (1897); *Covington v. First National Bank*, 198 U. S. 100, 111 (1904); *Home Savings Bank v. Des Moines*, 205 U. S. 503, 518 (1907); *Des Moines Bank v. Fairweather*, 263 U. S. 103, 111-112 (1923).

The court has made corresponding rulings with respect to instrumentalities of interstate commerce.[78]

At this late date it seems conclusively settled that the legal incidence test is the constitutional test —if the legal incidence of the tax is upon the United States, its instrumentalities, its property, or its contracts, the tax is invalid. This is true even though the economic incidence of the tax is upon a private individual and is to be collected solely through private individuals. In *Van Brocklin v. Tennessee*, 117 U. S. 151 (1886) the cause arose upon a bill to foreclose a tax lien on land then owned by private individuals conveyed them by the United States. The tax had been imposed while the land was in government ownership. See also *Pittman v. Home Owners Loan Corp.*, 308 U. S. 21 (1939). Maryland imposed a tax upon the mortgage—a contract—of a federal instrumentality, the H.O.L.C., plus a recordation fee. The tax was held invalid—its legal incidence was directly upon the contract of the government.

Constitution and legislation was the recipro-

[78] *Monamotor Oil Co. v. Johnson*, 292 U. S. 86, 93-94 (1934); *Felt & Tarrant Co. v. Gallagher*, 306 U. S. 62, 67-68 (1939); *McGoldrick v. Berwind-White Coal Co.*, 309 U. S. 33 (1940); compare also *Helvering v. Therrell*, 303 U. S. 218, 225 (1938); *Stahmann v. Bidal*, 305 U. S. 61 (1938); and *New Brunswick v. United States*, 276 U. S. 547 (1928).

cal and parallel measure of validity. The economic burden would have been passed to the borrowers.[79]

The converse would seem inescapably therefore to follow—a tax, the legal incidence of which is upon a private person is constitutionally valid, even though passed to the government by economics that is, by an identical amount being added to selling price. (A contract to reimburse is but a statement of economic verities.)

It must be uncontroverted, therefore, that the legal incidence of the Washington tax is upon a private individual—General Electric Company—and is therefore by all tests yet discovered, constitutionally valid. Indeed this was admitted by both the intervenor and appellant in the State Supreme Court. Appellants states at p. 30 of their Brief as Respondent before the State Court

> "For the purpose of the instant case, the respondent concedes (1) that, but for sec. 9(b), the taxes here in question were applicable to the respondent * * * and (2) that the re-

[79] See also *Colorado Co. v. Commissioner*, 95 U. S. 259 (1877); *Northern Pacific R. R. Co. v. Traill County*, 115 U. S. 600 (1885); *Wisconsin R. R. Co. v. Price County*, 133 U. S. 496, 504 (1889); *Irwin v. Wright*, 258 U. S. 219 (1922); *United States v. Rickert*, 188 U. S. 432 (1902); *Lee v. Osceola Imp. Dist.*, 268 U. S. 643 (1925). Basically these cases involve land owned by the United States prior to patent or passage of equitable title to private individuals. Taxes could not be collected from the grantees or patentees for the exempt periods.

spondent is an independent contractor, not an agent of the Commission.

"We also agree with appellant's [state's] contention (Br. 20-26) [dealing with the economic incidence, etc.] that generally independent contractors with the Federal government are subject to state and local taxation." (Citing cases.)

VIII. Taxes Applicable to Contractors With the Federal Government—General

1. Real Property Taxes

The real property of the contractor may be subjected to state taxation even though used in performing his contract with the United States. *Railroad Co. v. Penniston*, 18 Wall. 5 (U. S. 1873); *Central Pacific R. R. v. California*, 162 U. S. 91 (1895); *Baltimore Shipbuilding Co. v. Baltimore*, 195 U. S. 375 (1904); and *Choctaw Ong. R. R. Co. v. Mackey*, 256 U. S. 531 (1921).

2. Personal Property Taxes

The state may impose its personal property tax upon the machinery and equipment which the contractor brings into the state necessary to perform its contracts. *Taber, Treas. v. Indian Terr. Ill. Oil Co.*, 300 U. S. 1 (1937); *Gromer v. Standard Dredging Co.*, 224 U. S. 362 (1911).[80]

3. Use Taxes

In *Henneford v. Silas Mason Co.*, 300 U. S. 577 (1937) the court sustained a use tax imposed upon the machinery and equipment used by appellants in the construction of the Grand Coulee Dam. A claim of immunity under the federal instrumentality argu-

[80] The tax here was imposed on a Federal territory, but the reasoning is applicable to a state tax. See *Domenech v. National City Bank*, 294 U. S. 199 (1935).

ment was overruled in the district court and was not renewed in this court. (No. 418, 1936 Term.) See also *Curry v. United States*, 314 U. S. 14 (1941).

4. Sales Taxes

A sales tax on purchases by a contractor building an army camp for the government was upheld in *Alabama v. King & Boozer*, 314 U. S. 1 (1941). The legal incidence was upon the private individual. A sales tax on a sale to the government is invalid, *Indian Motorcycle Co. v. United States*, 283 U. S. 570 (1931); *Panhandle Oil Co. v. Knox*, 277 U. S. 218 (1928); and *Carson v. Roane-Anderson Co.*, 342 U. S. 232 (1952).

5. Net Income Tax

A contractor with the federal government is subject to a state tax on the net income realized from the performance of his contract. *Metcalf & Eddy v. Mitchell*, 269 U. S. 514 (1926); and *General Construction Co. v. Fisher*, 295 U. S. 715 (1935). A net income tax would not be as visibly reflected in amounts paid by the federal government—thus the economic burden would not be as measurably passed on—but passed on it would be. The contractor in submitting bids must compute his bid so he realizes a certain net profit margin after taxes. Further, he would undoubtedly consider existence of state net

income taxes in determining the desirability of doing business within that particular state. It is clear that to some extent at least the net income tax will reflect itself in a higher cost to the federal government.

> "Practically every State had to increase their payment of salaries when the Federal Government levied taxes."[81]

6. Gross Income or Gross Receipts, Franchise, Etc., Taxes

The only difference between a tax on gross income and one on net income is that the economic burden of the former is more ascertainedly passed on to the consumer. The distinction between gross and net income tax in the interstate commerce field is not applicable, *James v. Dravo Contracting Co.*, 302 U. S. at 158 (1937); *U. S. Glue Co. v. Oak Creek*, 247 U. S. 321-329 (1918); *Philadelphia and Southern S. S. Co. v. Penn.*, 122 U. S. 326 (1886); *cf. Crew Levick Co. v. Penn.*, 245 U. S. 292 (1917). The protection of interstate commerce requires the protection of private persons, whereas the protection of each sovereign under the dual-sovereign theory eschews protection of private individuals.

If the gross income from sales or receipts is measured by the cost of combined services and goods, as does the Washington tax here involved, the eco-

[81] Hearings, Joint Committee on Atomic Energy, April 24, 1952, p. 6.

nomic burden upon the purchasing Government differs in no manner whatsoever from the burden cast upon it by a manufacturing or property tax imposed upon the vendor. In interstate commerce a manufacturing tax, because its legal incidence is directed at a step prior to the sale (commerce), is valid, *Liggett & Myers Co. v. United States*, 299 U. S. 383 (1937). Similarly, sovereign immunity does not prevent the imposition of a transportation tax of commodities shipped by the seller to the sovereign, *Wheeler Lumber Co. v. United States*, 281 U. S. 573 (1930), nor a gross premium tax on bonds running to the United States, *Fidelity & Deposit Co. v. Pennsylvania*, 240 U. S. 319 (1916).

7. Payroll Taxes

These are normally worker's benefit taxes supplying such things as unemployment compensation, medical aid payments, compensation for disability, social security, etc. We know of no tax more directly geared to and measured by the performance or "activity" of a contractor. The validity of this tax is also based upon legal incidence, *Buckstaff Co. v. McKinley*, 308 U. S. 358 (1939). It is almost inconceivable to believe that Congress, by section 9(b), intended to exempt contractors from these taxes. But such must be the necessary position of appellants in contending for an unlimited scope for

section 9(b). Payroll taxes are one step closer to performance of the contract than a tax on gross income or gross receipts.

8. Summary

Each of these taxes is a very real part of the cost for performing the contract. Without the benefits paid for by such taxes either the contract could not be performed or the costs (which would be passed on) would be exorbitantly increased. Each tax will be passed on to the government in a more or less precise and measureable degree. In each case the cost would be reflected in the price paid by the federal government.

The contractor is not the sovereign. Thus, in *Baltimore Shipbuilding & Drydock Co. v. Baltimore*, 195 U. S. 375, 382 (1904), the court said:

> "* * * It seems to us extravagant to say that an independent private corporation for gain, created by a state, is exempt from state taxation, either in its corporate person or its property, because it is employed by the United States * * *."

Again, in *Fidelity and Deposit Co. v. Penn.*, 240 U. S. 319, 323 (1916):

> "But mere contracts between private corporations and the United States do not necessarily render the former essential governmental agencies and confer freedom from state control."

This court has on several occasions pointed out that the state or nation is to a greater or less degree affected by virtually every tax levied by the other. If the causal line which flows from the imposition of any tax or regulatory measure were pursued it would sooner or later be found to impinge upon the other government. Once the tax, the legal incidence of which is imposed directly upon the sovereign, is eliminated, the question necessarily becomes one of degree of proximity alone. Thus, in *Metcalf & Eddy v. Mitchell*, 269 U. S. 514 at 523

> "In the broad sense, the taxing power of either government even when exercised in a manner admittedly necessary and proper, unavoidably has some effect upon the other. The burden of federal taxation necessarily sets an economic limit to the practical operation of the taxing power of the state, and vice versa. Taxation by either the state or the federal government effects in some measure the cost of operation of the other."

And in *Group No. 1 Oil Corp. v. Bass*, 283 U. S. 279, 282 (1931), the court said:

> "Theoretically, any tax imposed on the buyer with respect to the purchased property may have some effect on the price, and thus remotely and indirectly affect the selling government * * *.
>
> "But the remote and indirect effects upon the one government of such nondiscriminatory

> tax by the other have never been considered adequate grounds for thus aiding the one at the expense of the taxing power of the other."

It would seem evident that except for the simple criterion of whether the government itself is the principal obligor of the tax, there can be no satisfactory distinction between the types of taxes which are sought to be imposed upon the private persons who deal with the sovereign, nor can there be any satisfactory distinction between taxes imposed upon prime-contractors, subcontractors, or even the original producer or manufacturer.

If the question turns solely upon the effect upon the sovereign, all taxes where legal incidence is not upon the sovereign have the identical effect despite the degree of proximity. The doctrine can have a just application only if all taxes the legal incidence of which are upon a private person are held within the taxing power of the government, whether it be of the nation or state. To attempt to distinguish between the various types of taxes or the varying degrees of immediacy in the economic chain is unsound. The doctrine of immunity of government bonds may carry special problems. *James v. Dravo Contracting Co.*, 302 U. S. at 152-153 (1937).

The picture is made more clear when other types of taxes are considered. The Washington Work-

men's Compensation taxes (and thus workers' benefits) and other payroll taxes designed to further employment security and injury compensation are also involved. Obviously, unless collections can be made, benefits cannot be paid. A decision on the dispute on this matter between the Washington Department of Labor and Industries as against General Electric and the AEC pends this case.[82]

The principle is far reaching. Should children be denied schools because their parents pay no taxes earmarked for school purposes? Property taxes support local schools operations, secure bonded indebtedness, etc. The AEC owns all the land and government owned property is exempt?

Much was made in the lower court of the fact that General Electric built schools and other public buildings. They had to if they were to be built. No state has authority to spend its tax moneys to enrich the land of another. Most public services at the local level are supported by property taxes and this avenue of revenue has vanished because of AEC ownership.

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[82] It is interesting to note that as to Workmen's Compensation taxes, the appellants take the opposite view to that presented here. They insist on paying these taxes, AEC Bulletin GM-LEG-9, Ser. 253, Senate Report No. 694, to accompany S. 671, July 28, 1953.

IX. Other State Regulatory Measures

As impressive as taxes included in the contract price is the large variety of state regulatory measures designed for the public welfare, and applied to contractors irrespective of the fact that the contract is made with the United States. If the United States chooses to carry out the activity itself, the state may not (with the exception of proper police power over individuals) control or regulate the manner in which the work is done, *Tennessee v. Davis*, 100 U. S. 257 (1879); *In re Neagle*, 135 U. S. 1 (1889); *Ohio v. Thomas*, 173 U. S. 276 (1898); *Boske v. Comingore*, 177 U. S. 459 (1900); *Johnson v. Maryland*, 254 U. S. 51 (1920); *Arizona v. California*, 283 U. S. 423, 451-452 (1931). Actually, the state may impose some regulation on federal officers and employees themselves, and the manner in which they perform their official duties, providing they do not conflict with or seek to control those duties. Thus, in *Johnson v. Maryland*, *supra*, 254 U. S. 51, the court said at p. 56:

> "Of course an employee of the United States does not secure a general immunity from state law while acting in the course of his employment. That was decided long ago by Mr. Justice Washington in the *United States v. Hart*, Pet. C. C. 390. 5 Ops. Atty. Gen. 54."

Contractors' employment relations are subject to state industrial laws, whether limiting hours of labor, protection against industrial accidents, requirements for sanitary facilities, and the employment of women and children. When contractors' trucks use state highways they do so through the power of the state to compel licenses for the driver. None would argue federal immunity, even Congressionally declared, would extend so far, yet the tax power is no less important to a state's existence than its police power. Failure to obey the law must subject the driver, and in certain instances the contractor, to liability for punishment, which cannot be avoided by the plea that the goods carried were destined either for the Coulee Dam, for General Electric, or for the AEC.

State courts are open to the contractor and his creditors alike. A contractor for the federal government, in his relationship with the state is the recipient of state benefits and has precisely the same status as does a contractor for a private corporation.

> "Taxes are what we pay for civilized society * * *." *New York ex rel. Cohn v. Graves*, 300 U. S. 308, 313 (1937).

To paraphrase the language in *Oklahoma Tax Commission v. United States*, 319 U. S. 598, 609 (1943):

> Washington supplied the appellant with schools, roads, courts, law enforcement and all

> the other benefits of an ordered society. Citizens of Washington must pay for these benefits. If some pay less, others must pay more.

Company towns alone cannot suffice.

To discriminate against a Federal contractor would be unthinkable. Why should it not be equally so if the discrimination is in his favor?

Materials taken to the Hanford Operations are taken over roads supplied and maintained by the state of Washington or its political subdivisions. The state supplies and pays for an educational system. The railroads over which the materials are taken to Hanford are protected and encouraged by Washington laws and Washington taxes, the appellant is able to obtain the skills and the maintenance of a civilized society through and only through the state of Washington and its political subdivisions. Without such benefits, the project could not be constructed and the contract performed, unless the Army or the AEC were willing to move into ungoverned territory and set up a complete panoply of governmental powers and duties. Governmental powers could only be set up by Congressional act. Company towns have not served democracy with distinction.

A contractor's gross receipts are a fairly reliable index of the extent of his activity within the state, and consequently the utilization of the state tax sup-

ported benefits available to him. No complaint has been levied against this tax because it imposes a disproportionate burden. Compare *New York ex rel. Cohn v. Graves, supra*, 300 U. S. 308, 313.

Normally contractors pay property or ad valorem and other taxes which partially offset losses caused by Government ownership. Here, that is not true. It is argued that the state derives other revenues incidentally as a result of appellant's activities, which may partially offset the cost the state incurs providing the benefits enjoyed.

The example of the offset usually given is increased payrolls, taxes on the property of the workers, etc. Property taxes support the great majority of local benefits—schools, roads, often police and fire protection, etc., and here there is no real property to be taxed. It is federally owned and thus exempt.

Additional payrolls also mean additional people and in turn additional tax burdens. Through legislative adjustment and public pressure the total tax program of a state comes into a varying but general balance with the totality of necessary, proper and beneficial public services. The increased demand for social betterment has left the balance on the debit side in this as well as other states. To excise a large area and activity from the taxing jurisdiction of a

state and yet increase the general burdens seems less than constitutional — less than "necessary and proper," particularly when to do so is to encroach on admitted constitutional rights.

If a sovereign state determines that a gross receipts tax upon contractors represents a fair blend of ability to pay with benefits received, we submit the appellant's independent contractual relationship with the Federal Government should be insufficient to remove the burden imposed upon contractors generally. It is to be noted in several statements during the hearings on the Atomic Energy Act of 1946 (previously cited) it was inferred that the AEC subsidized governmental expenses. This is only true in part.

We have been informed by the various state departments that the following expenditures of state tax moneys were made necessary as a result of the Hanford project.

Highway funds (exclusive of any Federal aid) $7,722,332.00

Workmen's Compensation 16,972.79

(Previous increases authorized by Rem. Rev. Stat., § 7679(6) (1947 Supp.). This deals with Industrial Insurance, Medical Aid and Accident Funds. Payments to General Electric workmen from state funds were terminated when General Electric ceased tax payments and brought this suit

for a refund. Such payments are made out of General Electric's fund over its and AEC's strenuous objection.) See also R. 76, 77, 78, 88, 89.

The Superintendent of Public Instruction informs us that state tax funds for the three school districts[83] primarily involved approximately 4.5 millions. The Hanford project contributed 1 million, 40% of which was for the maintaining of school buildings it owned. The facts of tax and budget life are presumably immaterial to a decision resolving constitutional matters. However, they do point up the danger in an imbalance or an altered balance of power and immunity.

Relative to that portion of section 9(b) authorizing the Atomic Energy Commission to make payments in lieu of taxes, RCW 84.72.010 (enacted in 1941) provides:

> "The state treasurer shall receive any moneys that may be paid to the state by the United States or any agency thereof in lieu of ad valorem property taxes, and transfer them to the respective county treasurers in accordance with apportionments made by the tax commission. The state treasurer shall immediately notify the commission of the receipt of any such payment."

The Office of State Treasurer informed us that as of December 3, 1953, that they had never received

[83] Richland, Kennewick and Pasco, Washington.

any such payments from the Atomic Energy Commission.

X. CONCLUSION—PART 2

If the legal incidence of a nondiscriminatory state tax is upon a private person, not upon the property, the contract or the Government itself, the tax is valid. The legal incidence test is sound conceptually since the dual sovereign concept is itself legal. The economic burden approach in a single economy is impossible and unfair in application, creating economic imbalances resulting in local citizens bearing an unfair and discriminatory burden. The legal incidence test is based in the Constitution and is the only test that measures all non-overruled cases on this subject—from the first to the last.

ARGUMENT—PART 3

XI. Power of Congress to Invalidate State Laws

The power to tax is an incident of state sovereignty and coextensive therewith. *McCulloch v. Maryland*, 4 Wheat. at 427; *Railroad Co. v. Peniston*, 85 U. S. 5 at 29 (1873):

> "That the taxing power of a state is one of its attributes of sovereignty; that it exists independently of the Constitution of the United States, and underived from that instrument; and that it may be exercised to an unlimited extent upon all property, trades, business, and avocations existing or carried on within the territorial boundaries of the State, except so far as it has been surrendered to the Federal government, either expressly or by necessary implication, are propositions that have often been asserted by this court."

Alabama v. King & Boozer, supra (sales tax); the companion case of *Curry v. United States*, 314 U. S. 14 (1941) (use tax); *James v. Dravo Contracting Co.*, 302 U. S. 134 (1937) (income and gross receipts tax); *Silas Mason Co. v. Tax Commission*, 302 U. S. 186 (1937) (Washington business or gross income tax), have all unqualifiedly held the state may impose its tax upon an independent contractor with the Federal Government when the legal incidence of that tax falls upon the contractor, despite the resul-

tant increased economic burden to the Government. The above cases are so-called landmarks but their actual effect was but to re-declare principles of legal incidence established in *McCulloch v. Maryland.*

This power of the state rests in the higher law—the Constitution, and when "immunity exists it is absolute, as it rests on an entire absence of power," *Johnson v. Maryland*, 254 U. S. 51, 55, 56 (1920) and see *Indian Motorcycle Co. v. United States*, 283 U. S. 570 (1931). The presence of the constitutional power to tax necessarily posits a constitutional absence of immunity. This absence of immunity only constitutional amendment may affect if in truth the power was constitutional. Unless the power was based upon a Congressional waiver of immunity by silence similar to the bankruptcy field.

If silence of Congress in no way waives immunity, *Graves v. New York ex rel. O'Keefe, supra*, 306 U. S. at 480, then Federal immunity is already extended to its farthest limit under the Constitution. If this is true, how can legislation extend it further?

In Congress resides no more prerogative to legislatively limit the states' taxing powers than to limit its police powers, or to limit the constitutional powers inherent in the President or in this Court. Could Congress declare this Court without jurisdiction to examine the constitutionality of its acts?

Witness the Malan regime in South Africa. This doctrine, abhorrent to concepts of constitutional and thus insured free government, is the necessary postulate of appellants' contention. This contention cannot logically co-exist with the many cases individually cited or the totality of all holdings of over 135 years.

We submit that the holding in *Carson v. Roane-Anderson*, 342 U. S. 232 (1952) is correct. The legal incidence was upon a contract with the Government, either through an agent or as a consumer under an ultimate vendee tax. A sale is a contract and a tax on a Government contract has always been invalid. *Weston v. City of Charleston*, 2 Pet. 449 (U. S. 1929), Marshall, C. J.:

> "A contract made by the Government * * * is * * * on the principles settled in the case of *McCullough v. State of Maryland*, to be exempt from state taxation." (p. 467, 468.)

Macallen Co. v. Massachusetts, 279 U. S. 620 (1929):

> "The principle set forth a century ago in *Weston v. Charleston*, 2 Pet. 449, 468, has never since been departed from by this Court."

The constitutional issues are grave. The expansion of the immunity of one government correspondingly curtails the constitutional power of the other to tax, since constitutional tax power and tax immunity are co-extensive. *Graves v. New York*

ex rel. O'Keefe, 306 U. S. 466, 483, 487 (1939). The power of the states to tax, held most recently to exist in *Alabama v. King & Boozer*, *James v. Dravo Contracting Co.*, *Curry v. United States*, *Silas Mason v. Tax Commission* and many other cases cited *supra*, unless granted by Congress could not be revoked by that body. If revocation may occur, the power cannot be constitutional.

If Congress may extend tax exemptions beyond constitutional immunities what is the necessity of the concept of constitutional immunity—why even a Constitution? If immunities are within legislative control, what is a "constitutional" immunity? What is a constitutional power? See *Graves v. New York ex rel. O'Keefe*, *supra*, 306 U. S. at 487:

> "Immunity is not one to be implied from the Constitution because if allowed it would impose to an *inadmissible extent* a restriction on the taxing power which the Constitution has reserved to state governments." (Emphasis Supplied.)

Legislative amendment to constitutional rights is an anathema to constitutional government. Constitutional and legislative rights are not co-equals. It is of no merit to argue that safety from legislative vagaries and violation of "rights" lies in representative government. This but states that we need no

Constitution; or, the one we have is merely the vestigial appendage of an old fashioned doctrine.

If the power of the state to tax can be repealed by Congress, that power cannot have a constitutional basis. The power would therefore only exist in Congressional waiver found in the silence of Congress. Such a finding would require the overruling of *Graves v. New York ex rel. O'Keefe, supra.* Silence of Congress dispels immunity no more than does silence of the Constitution.

The immunity of a state from federal taxation is likewise based upon constitutional limitations. That immunity is no less important to it than its constitutional power to tax.

> "Surely if the states are sovereign in anything, it must be in the matter of taxation, upon which their very life depends." *State ex rel. Atwood v. Wooster*, 163 Wash. 659 at 665, 2 P.(2d) 653 (1931).

Under the immunity doctrine, Congress, in the exercise of its revenue powers, has been held constitutionally unable to impose a sales tax upon a sale by an independent contractor to a state for governmental purposes. *Indian Motorcycle Co. v. United States*, 283 U. S. 570 (1931), the legal incidence of the tax was upon a contract of the state and "that alone" (p. 514), despite where either the original or ultimate economic burden lay. Where the principle

applies it is absolute and not dependent upon the amount or the extent of the resulting interference (p. 575). Many other cases properly limit Congressional revenue powers.

The supremacy power of Congress must be as important in a revenue obtaining field as in the revenue depletion field. The many cases holding a particular federal tax upon the state or its contracts to be constitutionally invalid cannot be consistent with upholding the expansion of legislative power from the other direction. A congressional declaration should be as valid (or invalid) in the one instance as the other.[84]

The right of a state to tax is its right to exist. Under our Constitution, that right cannot lie within legislative decision. To argue otherwise is to deny any limitation upon congressional power. Should this doctrine ever prevail, we submit it must do so by amendment of the people to their Constitution.

A state is a geographic sum of individuals. Individuals have certain constitutional rights. No one

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[84] See 51 Yale Law Rev. 482, 483 (1941-1942); *Flint v. Stone Tracy & Co.*, 220 U. S. 107, 165 (1911); *Liggett & Myers Co. v. United States*, 299 U. S. 383, 386 (1937); 1 Willoughby, Const. Law (2d ed. 1929) 382; *Board of Trustees v. United States*, 289 U. S. 48, 59 (1932); and *Collector v. Day*, 11 Wall. 113 (U. S. 1870) overruled, *Graves v. New York ex rel. O'Keefe*, 306 U. S. 466, 486 (1939); *Pollock v. Farmers' Loan & Trust*, 157 U. S. 429, 158 U. S. 601 (1895).

who honors the constitutional rights of an individual could assert that those rights could be legislatively limited, amended, or repealed. Can the constitutional rights of the group be less than the rights of each member? If the constitutional rights of the whole may be legislatively repealed, can the rights of the individual be far behind.

The power to tax under our governmental concepts lies not in divine sovereign right. That principle is abhorrent to a free people. Taxing power rather, is granted by a free people to its government. It consists of the proportionate contributions of citizens to pay for the benefits of their government. Here a people demand that those who, independent of government use those benefits, also contribute.

Assume a situation where neither the legal nor economic incidence of the Washington tax lay upon the federal government. A good example is General Electric's sales to others than the AEC for which it also claims exemption. The tax could in no manner "burden" the government. Yet under appellants' argument, section 9(b) would exempt. There is, we submit, neither sound theory nor logic capable of sustaining such an exemption. It certainly could not be "necessary and proper."

In substance, appellant's argument discards the legal incidence and adopts instead the economic

burden test, arguing that since the tax will be passed on, it must be within Congressional powers to prohibit. If this is the basis of the Congressional power, it is not limited to just the non-transactions tax upon the independent contractor with whom the government deals. The power to exempt must also extend to all types of taxes upon the contractor as well as on suppliers, the sub-suppliers, back to the very producer himself since the economic burden on each is also measurably passed on to the government.

A limit must exist; if it did not it would lie within Congressional power to create complete anarchy in any state where federal operations were substantial. Section 9(b) of the Atomic Energy Act declared existing constitutional law. The holding of *Carson v. Roane-Anderson* was correct. The tax was invalid as being on federal contracts. We submit that this marks both the constitutional and legislative limits. Both gross and net income taxes are outside that limit.

That a situation may arise where neither the legal nor economic incidence of the tax is upon the government is not idle assumption. Such contracts

> "to the extent that it is practicable and is consistent with security requirements, such contracts are let by competitive bidding on a lump-

sum or unit-price basis." Statement by Carroll L. Wilson, General Manager, AEC.[85]

It would seem logical that a state has as much power to protect its governmental functions as Congress. In other words, enact its own section 9(b). Logically extended, this would mean that each had complete power to tax and the immunity of each is lost. The tax power would necessarily have to be absolute since as soon as a limit to the power is found, immunity begins. If a legislative limit exists, it must be constitutional. Constitutional powers are no greater than constitutional limits.

We have dual sovereigns—the state and the nation—exercising jurisdiction upon corresponding geography, subjects and economy. Thus, even though one sovereign utilizes the tax supported benefits of the other, the very concept of sovereignty prevents *its* being taxed—that is, prevents *it* from being required to bear its fair share of even a nondiscriminatory burden. This is a basic element of the freedom guaranteed by checks and balances.

The power of each sovereign to tax is enshrined in that Constitution which rises above and governs both. The tax power is essential to the sovereignty of each as is the immunity of each from taxation by the other.

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[85] Appendixes, Hearings, Joint Committee on Atomic Energy, part 23, 81st Cong., 1st Sess., p. 1089.

Assuredly, we are all citizens of one Nation. However, we each and jointly have rights with respect to the state and federal whole—if these rights be truly in the Constitution and based in democratic concepts of local and thus true self government, can the unintentional fiat of either legislature alter those rights.

Assuredly, the people of one state have no right, constitutional or otherwise, to exact moneys from the inhabitants of forty-seven other states in excess of that which they themselves pay. In other words, a discriminatory tax would be invalid. However, the people of the forty-seven other states likewise may not impose upon the people of the single state and demand that the state functions necessary to the operations of federal contractors be supported in an extent to which those of the forty-seven do not in like measure contribute.

We, like the federal government, have located no single case "which is good law today" decreeing an independent contractor immune from state taxes when the legal incidence of that tax falls upon him despite the resultant economic burden upon the federal government. Every time the validity of a state (or federal) tax has been denied, the legal incidence of that tax was upon government property, its instrumentalities, or its contracts. For example, see

Smith v. Kansas City Title and Trust Co., 255 U. S. 180, 211-212 (1921); *Federal Land Bank v. Crosland*, 261 U. S. 374 (1923); *Pittman v. H. O. L. C.*, 308 U. S. 21 (1939); *Federal Land Bank v. Bismarck Lumber Co.*, 314 U. S. 95 (1941); *Maricopa County v. Valley National Bank of Phoenix*, 318 U. S. 357 (1943); *City of Cleveland v. United States*, 323 U. S. 329, 333 (1945); and see *Metcalf and Eddy v. Mitchell*, 269 U. S. 514 (1926); *Mayo v. United States*, 319 U. S. 441 (1943); *Educational Film Corp. v. Ward*, 282 U. S. 379, 386 *et seq.* (1931); *Alward v. Johnson*, 282 U. S. 509 (1931); *Liggett & Myers Co. v. United States*, 299 U. S. 383 (1937); *Standard Oil Co. v. Johnson*, 316 U. S. 481 (1942); and see *Nelson v. Sears, Roebuck & Co.*, 312 U. S. 359 (1941); *Nelson v. Montgomery Ward & Co.*, 312 U. S. 373 (1941); *Buckstaff Co. v. McKinley*, 308 U. S. 358 (1939); and particularly *Fidelity & Deposit Co. v. Penn.*, 240 U. S. 319 (1916).

The economic burden is the normal and expected burden of dual sovereignty in a single economy. Without constitutional alteration, neither can escape it. The right of one to be free of taxation by the other does not spell immunity from the added costs attributable to the taxation of those who sell supplies, land, or services to the government.

The powers of Congress must necessarily have a limit. Otherwise all is legislative, none is constitutional. One of the handholds of our freedom lies in the constitutional limitations upon legislative power. If the economic burden test is unsound constitutionally, it must also be unsound as a test of constitutional power to expand immunity.

Economic burden alone cannot justify that power—it must rest on an additional basis. The only sound additional basis, is that Congress has power to declare its contracts (mortgages, bonds, etc.) exempt from taxes the legal incidence of which is upon such contracts—sales, mortgages, certain forms of intangible taxes. This we submit the Constitution has already done.

It should not be extended to exempt taxes, the legal incidence of which is on individuals and which are unrelated to transactions except that they indicate the measure of the tax benefit and thus the measure of the tax duty. A franchise tax measured by dividends is not invalid despite a congressional act declaring federal bonds "exempt from state taxation in any form" even though the dividends included the income from the contracts—bonds. The tax is upon the person, the method of measurement does not cause it to be invalid, *Home Ins. Co. v. New York*, 134 U. S. 594 (1890); *Liggett & Myers Co. v. United*

States, 299 U. S. 383 (1937); *Fidelity & Deposit Co. v. Pennsylvania*, 240 U. S. 319 (1916); *James v. Dravo Contracting Co.*, 302 U. S. 134 (1937).

CONCLUSION

The State of Washington does not attempt to assert unusual power nor does it attempt to encroach upon or belittle the powers of the national legislature. It seeks only to retain, for the state, the minimum power necessary to protect its citizens against discrimination—against the payment of an unjust burden.

The appellant and the government, with full knowledge of Washington tax laws and state tax powers under the controlling judicial declarations of constitutional rights, executed a contract providing certain profits to the appellant and constituting appellant an admitted independent contractor. General Electric is not and is not claimed to be an instrumentality of the government. The Atomic Energy Act does not authorize setting up private instrumentalities.

If states have no rights to tax federal agencies or instrumentalities because outside their taxing jurisdiction, there can be no conflict between this non-existing right and the power of Congress to establish the instrumentality; thus the supremacy clause is not involved. An exemption to a private corporation for gain, from a nondiscriminatory, nonburdensome tax, which does not, cannot, and is not

claimed to interfere with federal functions, can hardly be "necessary *and* proper."

Power of taxation is inherent in state and national sovereignty. Neither may tax the other without express consent and the immunity of one is necessarily co-extensive with the power of the other. The line of demarcation based in the Constitution may not be changed by the legislative fiat of either Government, since to extend the immunity of one can only encroach upon the constitutional power of the other. Constitutional rights must otherwise be held for naught. If Congress, as it has been held, may not extend its power to tax—how then can it extend its immunity? A limit to power must exist, we submit that limit is reached here.

Congress neither could nor attempted to invalidate such taxes as are found here. Section 9(b) merely denies assent to tax *transactions* of the AEC. Only a sale to or contract between could be an act or transaction of the AEC. The performance of General Electric was logically and under section 4(c)(2) its own activity—the activity of an independent entity. The Washington tax, contrary to that of Tennessee, is not imposed upon transactions.

We deem it significant that only this analysis conforms to (1) the legislative history of the Act; (2) the time honored constitutional pattern; (3) the

previous continuing and reaffirmed policy of both Congress and the President; and (4) which conforms to the language and purpose of the Act. The act of one cannot be the act of another unless agency exists. Both legislation and contract must conform to the Constitution, not the Constitution to legislation or AEC's contracts.

Respectfully submitted,

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January, 1954

APPENDIX

Case Synopses

1. Preface

We attempt here to collate all relatively important cases reasonably apposite to the present problem. Obviously the myriad of decisions which more or less fringe upon the instant issue deny a complete listing. In our argument *supra*, we endeavor to reduce each case to its essentials in the light of the totality of all holdings. We attempt here, however, to present the logical inferences from the holdings despite decisional inconsistencies. Inconsistencies which do not occur as often as first impression might indicate. Our interpretive accuracy we submit to the case itself.

The following summarization of short analyses of fact and law should in no way be construed as an attempted substitute for detailed examination. We trust it will be taken as proffered, an attempt to provide some small assistance to the Court.

2. Decisions

Alabama v. King & Boozer,

314 U. S. 1 (1941), Justice Jackson did not participate.

Stone, C. J.: King & Boozer sold lumber to a cost-plus-fixed-fee contractor building an army camp for

the United States. The Alabama sales tax was upon the sale to the contractor-vendee who was "reimbursed" by the Government. The Alabama Court held as the Government argued, that the contractor was so related to the Government by the contract, and so far acting in the performance of a governmental function, that the legal incidence of the tax, in effect, was upon the Government (p. 9). *HELD Reversed, Tax Valid:* The sole question involved is constitutional tax power and constitutional tax immunity (p. 8). A non-discriminatory state tax which increases Government costs is but a normal and expected result of dual sovereignty and cannot result in constitutional immunity. Other conclusions are no longer tenable (pp. 8-9). The legal incidence of the tax was upon the independent contractor. The Government's specific assumption of the economic burden, by its contract to reimburse, cannot shift the legal incidence or place the State tax upon itself (pp. 12-13). Therefore, the State has constitutional power to levy the tax. If a contrary view was indicated by *Panhandle Oil Co. v. Knox*, 277 U. S. 218 (1928) and *Graves v. Texas Co.*, 298 U. S. 393 (1936), it is no longer tenable. *Comment:* Note that the contract provisions are almost identical to appellants. (pp. 10-12, 13.)

Alward v. Johnson,

282 U. S. 509 (1931).

McReynolds, J.: California levied an in lieu of property tax, measured by gross receipts, upon the operation of a stage line, the *primary* and *necessary* receipts of which came from a Government mail contract. *HELD Affirmed, Tax Valid:* The tax is non-discriminatory and its legal incidence is upon the gross income, the property of the [independent] contractor, not on the Government [or its transactions]. The tax funds were used to provide general state benefits essential [as here] to the contractor's operations (p. 514).

Atkinson v. Tax Commission,

303 U. S. 20 (1938), Justice Cardozo did not participate.

Per Curiam: Oregon imposed its personal income tax upon the income (receipts) of Federal employees building a dam on the bed of the Columbia River. *HELD, Tax Valid:* The legal incidence of the tax was upon the employee, not the Government or its transactions. *Metcalf & Eddy v. Mitchell; James v. Dravo Contracting Co.*; and *Silas Mason Co. v. Tax Commission, supra,* and the State had concurrent territorial jurisdiction over the area. The Government [as here] did not assert "exclusive jurisdic-

tion" and Oregon's Workmen's Compensation benefits were utilized [also as here].

Baltimore Shipbuilding Co. v. Baltimore,

195 U. S. 375 (1904).

Holmes, J.: The State levied its property tax upon land sold by the Government to a corporation for dry dock purposes. If the property was left unfit for such use for over six months, it would revert to the Government. *HELD Affirmed, Tax Valid:* The legal incidence of the tax was upon the estatual interest of the company, and not on the interest of the Government. The tax may be measured by the full value of the property since the interest of the Government was only a condition subsequent.

Buckstaff Co. v. McKinley,

308 U. S. 358 (1939), Justice Reed concurs specially.

Douglas, J.: Arkansas imposed its Unemployment Compensation "taxes" upon the operation of a bath house on a Federal reservation (Hot Springs National Park). *HELD Affirmed, Tax Valid:* The legal incidence of the tax is imposed, not upon a Federal instrumentality, but the operation of a private business for profit. Further, the State Act is interrelated to the Federal Social Security Act.

> "The control reserved by the Government for protection of a governmental program is not

incompatible with the retention of the status of a private enterprise." (p. 363.)

Curry v. United States,

314 U. S. 14 (1941), Justice Jackson did not participate.

Stone, C. J.: A companion case to *Alabama v. King & Boozer, supra*, involving the Alabama "use" tax charged against the cost-plus-fixed-fee contractor, who received Government reimbursement therefor. The Government again argued and the State court held that since it had contracted to reimburse, the legal incidence of the tax was, in effect, upon the Government and thus the tax was invalid. *HELD Reversed, Tax Valid:* The contractors were independent. The contract by which the Government agrees to reimburse can shift *only* the economic, *not* the legal, incidence of the tax.

Esso Standard Oil v. Evans,

345 U. S. 495 (1953).

Reed, J.: The Tennessee business tax, upon a private individual measured by his storage of gasoline is not invalid when the gasoline is owned by the Government. The tax was measured by gallonage. The contract to reimburse cannot change the Constitutional validity of the tax. *United States v. Allegheny County*, distinguished (p. 499). The Government could have stored the gasoline itself and been exempt, (p. 500).

314 U. S. 95 (1941), Justice Jackson did not participate.

Murphy, J.: The Federal Land Bank foreclosed a farm mortgage, then purchased $408.26 of lumber to repair the farm. The Lumber Company demanded the North Dakota sales tax of $8.02 from the land bank and was refused. The State court upheld the tax even though, as with the Tennessee tax, the retailer was *required to collect the tax from the purchaser*, the Government. *HELD Reversed, Tax Invalid:* The bank, as purchaser, was a Federal instrumentality (p. 102).

> "It is clear that the North Dakota statute makes the purchaser, petitioner [bank] here, liable for the sales tax. Section 6 of the Act requires the retailer to add the tax to the sales price and declares the tax to be a debt from the consumer to the retailer. Section 7 makes it unlawful for the retailer to hold out that he will absorb or refund the tax in whole or in part." (p. 99.)

The court accepted the conceded position that the legal "incidence" of the tax was on the purchaser—a Federal instrumentality. The tax was therefore constitutionally invalid and Congress had the power to refuse to waive immunity.

Federal Land Bank v. Crosland,

261 U. S. 374 (1923).

Holmes, J.: The Federal Land Bank lent certain money and took a mortgage therefor. It then attempted to record the mortgage by paying only the recording fee, but not the Alabama tax on the mortgage. *HELD Reversed, Tax Invalid:* The bank was a Federal instrumentality and the mortgage was a constitutional function thereof. The legal incidence of the tax fell directly upon the mortgage, a contract of the Government. The tax was constitutionally invalid, thus Congress could constitutionally refuse to waive immunity. Recordation was merely a method of collection.

Fidelity & Deposit Co. v. Pennsylvania,

240 U. S. 319 (1916).

McReynolds, J.: A surety company contracted to furnish surety bonds to the Federal Government. The Pennsylvania tax on its gross receipts was *HELD, Valid:* The surety company was an independent contractor and not therefore a Federal instrumentality. The legal incidence of the tax was neither upon the Government nor its contract, but upon the contractor. Use of the receipts from the Government to "measure" a tax upon a private individual does not invalidate a tax.

306 U. S. 466 (1939), Justice Hughes concurs in the result; Justice Frankfurter specially concurs; and Justices Butler and McReynolds dissent.

Stone, J.: New York imposed its personal income tax upon the salary of employees of the Federal Home Owners Loan Corporation, a Federal instrumentality (p. 479). *HELD Reversed, Tax Valid:* The legal incidence of the tax is not upon the Government (p. 481), and

> "the only possible basis for implying a constitutional immunity * * * is that the economic burden of the tax is in some way passed on." (p. 481.)

The economic burden theory has been discarded in *James v. Dravo Contracting Co., supra*; *Metcalf & Eddy v. Mitchell, supra.* Specifically overruled are *Collector v. Day*, 78 U. S. 113 (Wall. 1870) and *New York ex rel. Rogers v. Graves*, 299 U. S. 401 (1937) in so far as their holding is contrary to the holding here. The expansion of the immunity of one Government, if allowed, would curtail the constitutional power of the other to tax (pp. 483, 487). *Dissent:* Since the H.O.L.C. is a Federal instrumentality, a tax on the salaries of its employees should be invalid.

Helvering v. Mountain Producers Corp.,

303 U. S. 376 (1938), Justices Cardozo and Reed did not participate, Justices Butler and McReynolds dissent.

Hughes, C. J.: "A" leased school lands for oil purposes from Wyoming, the State reserving a 65% royalty for school, *i.e.*, state governmental purposes. The lessee declared a trust for taxpayer "B" of an undivided 50% and "B" was federally taxed on the whole of its gross proceeds which included the State's portion. *HELD Reversed, Tax Valid:* The legal incidence of the Federal tax was upon the taxpayer, measured by gross receipts, and not upon the State or its instrumentality. Overruled are *Burnet v. Coronado Oil & Gas Co.*, 285 U. S. 393 (1932) and *Gillespie v. Oklahoma*, 257 U. S. 501 (1922) which hold that private income from leases of Federal or Indian lands is exempt. A tax upon the private income from a lease is not a tax upon the power to make them despite the resultant increased economic burden upon either the State or Federal Government (p. 384-385). *Dissent, Butler, J.:* Such a tax imposes an economic burden upon the ability of the Government, state or Federal, to make the best contracts it can.

Indian Motorcycle Co. v. United States,

283 U. S. 570 (1931), Justices Stone and Brandeis dissent.

Van Devanter, J.: Congress imposed a Federal sales tax, collected from the seller, upon a sale by an independent contractor to a State for governmental purposes. *HELD, Tax Invalid:* The legal incidence of the tax was upon the sale (a contract and transaction of the State) "and that alone" (p. 514) despite where either the original or ultimate economic burden (incidence) lay. The validity of the tax depends upon the principle of legal (not economic) independence of dual sovereigns. Where the principle applies it is absolute, and not dependent upon the amount or the extent of the resulting interference (p. 575). Congress may not constitutionally lay such a tax.

James v. Dravo Contracting Co.,

302 U. S. 134 (1937), Justices Roberts, McReynolds, Sutherland, and Butler dissent.

Hughes, C. J.: West Virginia imposed a non-discriminatory tax upon the business privilege of contracting, measured by gross receipts, upon a contractor who built dams for the Federal Government. *HELD Reversed, Tax Valid:* West Virginia had concurrent jurisdiction of these Federal areas within her boundaries (pp. 140-141). Dravo was an independent contractor (p. 149) and thus not an instrumentality of the Government. Therefore the legal incidence of the tax was not upon a Government instrumentality (p.

149), and it was not upon a contract [*activities*] of or sale to the Government (pp. 149-150, 151-158). A tax upon or measured by gross receipts for these purposes does not differ from a tax upon the contractor's own and separate property (pp. 153, 160) which merely increases Government cost by the normal, expected and non-discriminatory tax burden (p. 160). *Dissent: Roberts, J.:* The concept of immunity is neither derived from Congress nor common law, but from the constitutional necessity of maintaining our dual system of government (pp. 161-162). He agrees that the legal incidence of a gross receipts tax is not upon the Government (p. 163), or its contract (p. 164), but he feels an *independent* contractor doing work for the Government is an "*agent*" of the Government and therefore *the contractor* should be constitutiona..y immune. He sees no difference between a tax upon a sale to [contract of] the Government and a tax upon gross receipts. (We submit and the majority held that the difference is in "legal incidence.")

Mayo v. United States,

319 U. S. 441 (1943), Justice Black concurs in the result.

Reed, J.: The Federal Department of Agriculture bought fertilizer pursuant to a soil conservation program and distributed it to farmers in Florida. The

State attempted to levy its admittedly reasonable inspection fee upon the Government. *HELD Affirmed, Fee Invalid:* A Government instrumentality was the actual owner of the fertilizer (p. 445), and the legal incidence of the inspection fee was "directly upon the United States" (p. 447).

Maricopa County v. Valley Bank,

318 U. S. 357 (1943), Justice Rutledge did not participate.

Douglas, J.: Arizona attempted to tax bank shares which were owned by the Reconstruction Finance Corporation, a Federal instrumentality. Congress had previously waived its immunity from State taxation, then revoked it. *HELD Affirmed, Tax Invalid:* The legal incidence of the tax was directly upon the shareholder (p. 359), a Federal instrumentality (p. 361). The ability of the State to tax a Federal instrumentality is not a constitutional power but a revocable privilege granted by Congress (p. 361).

McCulloch v. Maryland,

4 Wheat. 316 (17 U. S. 1819).

Marshall, C. J.: Maryland attempted to impose its bank tax upon the operations of a bank of the United States. *HELD Reversed, Tax Invalid:* Congress may constitutionally establish national banks (pp. 404-411, 422) and such are Government instrumentalities (pp. 411, 424). Thus the legal incidence of

the tax was directly upon the Federal Government. The power to tax [by the imposition of the legal incidence of a tax upon another sovereign government] is the power to destroy (pp. 426-427, 431). The Maryland tax statute was held unconstitutional and void. (p. 435.)

Metcalf & Eddy v. Mitchell,

269 U. S. 514 (1926).

Stone, J.: The Federal Government imposed a tax upon the income [receipts] of independent contractors performing services for the state. *HELD, Tax Valid:* An independent contractor is not an instrumentality of the State. The legal incidence of this tax is upon the contractor even though the tax is measured by amounts received from the State. Under our dual system of sovereign governments, neither may tax a governmental instrumentality of the other (p. 521).

> "It seems extravagant to us to say that an independent private corporation for gain created by a State, is exempt from state taxation either in its corporate person, or its property, because it is employed by the United States, even if the work for which it is employed is important and takes much of its time." (p. 525.)

(And, we might add, even if the contract contains a "hold harmless" and a misleading "for one dollar" phrase.)

Oklahoma Tax Commission v. Texas Co.,

336 U. S. 342 (1949), Justice Jackson concurs in the result.

Rutledge, J.: Oklahoma levied (1) a privilege and (2) as in lieu of property tax upon non-Indian mineral lessees of allotted and restricted Indian lands. *HELD Reversed, Tax Valid:* The tax is non-discriminatory and its legal incidence is upon the lessee (an independent contractor) not the Indian ward. The tax provides and supports general state benefits which the lessee (contractor) uses and enjoys (p. 351).

Oklahoma Tax Commission v. United States,

319 U. S. 598 (1943), Chief Justice Stone and Justices Reed, Frankfurter and Murphy dissent.

Black, J.: Oklahoma imposed an inheritance tax on the transfer of Indian estates composed of (1) lands exempt from direct state tax; (2) lands not exempt from direct state tax; and (3) restricted cash and securities held by the Secretary of Interior. *HELD,* (except as to "(1)"), *Tax Valid:* The State supplies the Indians with tax supported roads, schools, police protection, courts and other tax supported benefits (p. 609).

> "This Court has repeatedly said that tax exemptions are not granted by implication. *United States Trust Co. v. Helvering,* 307 U. S. 57, 60."

Dissent: All the properties and the transfers thereof should be exempt unless Congress, in the interest of its wards, removes the immunity.

Pittman v. H. O. L. C.,

308 U. S. 21 (1939), Justice Butler did not participate.

Hughes, C. J.: The State of Maryland imposed a tax upon the mortgage of the Home Owners Loan Corporation plus a recordation fee. *HELD Affirmed, Recordation Fee Valid, Tax Invalid:* The Home Owners Loan Corporation is a Federal instrumentality (pp. 29-30), and the legal incidence of the tax is upon the mortgage (or contract) of that instrumentality. (Note that the *economic* incidence of the tax would be passed on to the borrowers who would be independent contractors.)

Pollock v. Farmers' Loan & Trust Company,

157 U. S. 429 (1895).

Fuller, C. J. (p. 553): A Federal tax on the principal or interest of a state or municipal bond is invalid as a tax upon the borrowing power of a state (pp. 584-586). (The legal incidence of the tax was upon the state contract.)

Railroad Co. v. Penniston,

85 U. S. 5 (Wall. 1873), Justice Swayne concurred in the result, Justices Bradley and Field dissent.

Strong, J.: Congress chartered the Union Pacific Company which was organized under state laws and owned by individuals for private gain. The corporation was assisted by congressional loans and it contracted with the Government to build a railroad and telegraph lines and carry mails, troops, public stores, munitions and supplies of war. Nebraska levied an *ad valorem* property tax upon that portion of the railroad within its territory. *HELD, Tax Valid:* The taxing power of a state is an element of sovereignty (p. 29). Such taxes cause a normal increase in costs to the Federal Government under our dual system of sovereignty (pp. 30-31) and to deny the State that power, for that reason, would deny to them all power to tax (p. 31). The legal incidence of the tax falls upon the property [like gross receipts] of what the court here finds to be an "agent" (p. 32) and not upon the functions of the agent, which, as an agent, would be a tax upon the functions of the Government itself. *Dissent:* The question is one of power and Nebraska should have no power over that which it neither created nor permitted to do business within its boundaries (p. 38). The concepts applicable to an agent differ "*toto coelo*" from that of an independent contractor (p. 41).

Silas Mason Co. v. Washington Tax Commission,

302 U. S. 186 (1937), Justices McReynolds, Sutherland, Butler and Roberts dissent for their reasons in the *Dravo* case, *supra.*

Hughes, C. J.: Mason Company contracted with the Government to perform certain work in building the Grand Coulee Dam. The contract involved in excess of twenty-nine millions of dollars and [as respondent's], it required Mason Company to obtain the necessary state permits and to furnish Washington Unemployment Compensation to its workers. It was also, [like respondent], to build and operate a contractor's camp—Mason City, to furnish community services, and to abide all state laws and regulations pertaining to sewage disposal, police protection, school facilities, etc. Washington imposed the identical business and occupation tax upon Mason Company as is here imposed upon respondent. The tax was measured by gross receipts and based upon the contractor's privilege of doing business in this state but was under the service rather than retailer's classification. (Laws of 1933, Ex. Sess., Chap. 57, sec. 1, designated as sec. 2-a, (1), (Rem. Rev. Stat., § 8370-4, as amended).) *HELD, Tax Valid:* (affirming *Mason, Inc. v. State Tax Commission,* 188 Wash. 98, 61 P.(2d) 1269 (1936), and *Ryan v. State,* 188 Wash. 115, 61 P.(2d) 1276 (1936), both cases had

been heard *en banc*). Washington had concurrent territorial jurisdiction (as here) over the area (pp. 198-210). Mason Company was an independent contractor upon whom fell the legal incidence of the identical tax as that imposed upon respondent. The majority held that Washington, under the *Dravo* and like decisions, *supra*, had the constitutional power to impose this tax. Note again, the identity of fact pattern and Washington tax law. Further, the Washington court, as affirmed by the United States Supreme Court, specifically held that the legal incidence of this tax was not upon "sales" (of services) to the Federal Government, 188 Wash. at 124, but upon an independent contractor and thus the tax was valid.

Smith v. Davis,

323 U. S. 111 (1944).

Murphy, J.: The State of Georgia levied its personal property tax on intangibles upon an amount due independent contractors from the Federal Government for contractual services performed. The contractors contended that the amount was a "credit instrumentality" of the United States. *HELD Affirmed, Tax Valid:* The legal incidence of the tax was upon the interest of contractors who were contractually independent of the Government. An open account claim is not a "credit instrumentality" (p. 113).

Thomson v. Pacific Railway,

76 U. S. 579 (Wall. 1869).

Chase, C. J.: (The fact situation is almost identical to *Railroad Co. v. Penniston, supra,* except that the tax involved was the Kansas property tax.) *HELD, Tax Valid:* The corporation owed its existence to state, not national law and received the tax supported privileges and benefits of the states. The property of Government "agents" is subject to state property taxes. The application and reasoning of *McCulloch v. Maryland, supra,* is limited (p. 590).

Trinityfarm Construction Co. v. Grosjean,

291 U. S. 466 (1934), Justice Cardozo concurs in the result.

Butler, J.: Louisiana imposed an excise tax of five cents per gallon upon an independent contractor's use of gasoline to perform his Government contract to build levies. *HELD Affirmed, Tax Valid:* The appellant is an independent contractor and "not a Federal instrumentality" (p. 472). The legal incidence of the tax is upon him and not upon the Government or its transactions. The validity of the tax

> "does not depend upon the amount of the exaction, the weight of the burden or the extent of the resulting interference with sovereign independence. Where it applies, the principle is an absolute one wholly unaffected by matters or distinctions of degree." (p. 471.)

United States v. Allegheny County (Penn.),

322 U. S. 174 (1944), Justices Black and Douglas concur in the result; Justices Roberts and Frankfurter dissent.

Jackson, J.: The Government, for "one-dollar," leased certain machinery to a munitions maker, but retained title thereto. The State in levying its real property tax, included the machinery. *HELD Reversed, Tax Invalid:* The legal incidence of this tax is directly upon property owned by the Federal Government (p. 185) and the validity of the tax is not

> "dependent upon the ultimate resting place of the economic burden of the tax." (p. 189.)

[Note that the tax is not upon the lease interest of the contractor which would be his personal property and that Congress had not waived its constitutional immunity.]

Willcutts v. Bunn,

282 U. S. 216 (1931).

Hughes, C. J.: Bunn purchased Minnesota municipal bonds and later sold them at a profit upon which the Federal Government levied its income tax. *HELD Reversed, Tax Valid:* The legal incidence of the tax is upon the profit of an independent contractor. It is neither upon the State nor its contracts (transactions—activities) as would be a tax upon principal or interest (p. 227).

Wilson v. Cook,

327 U. S. 474 (1946), Justice Jackson did not participate. Justice Douglas concurred in the result, and Justice Rutledge dissented.

Stone, C. J.: An independent contractor with the Federal Government contested the Arkansas privilege tax imposed upon his cutting timber on Federally owned land but over which the State had concurrent jurisdiction. The contractor's argument that the tax was required to be collected from the Government at time of severance was not presented to the State court and thus could not be considered on certiorari (p. 483). *HELD, Tax Valid:* In so far as this case is concerned, the legal incidence of the tax is upon the independent contractor and not upon the Government or its property since it was not argued otherwise in the court below. *Dissent:* It is true that the economic burden upon the Government is insufficient to invalidate a state tax, but the case should be remanded for the state to determine where the legal incidence of the tax lay.